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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA, PHIL D'ANDREA, CHARLES GIOE and JOHN BOSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 N. Market St., Chicago. FRAnklin 0661

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IN THE

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LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Harlan F. Stone and Associate Justices of the Supreme Court of the United States:

The petition of Louis Compagna, Paul De Lucia, Phil D'Andrea, Charles Gioe and John Rosselli by Wm. Scott Stewart, their counsel, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Summary of the Record.

Petitioners were indicted in the United States District Court, Southern District of New York, charged with conspiracy in connection with interstate commerce, to obtain,

by the use of threats, the payment of a large sum of money, from a group of corporations engaged in the motion picture business. After verdict and sentence their appeal to the United States Circuit Court of Appeals for the Second Circuit followed. All of your petitioners were there heard upon the same record, having been jointly tried. All convictions were affirmed.[1a] Your petitioners comprise five of the seven convicted.

The Indictment.

The indictment (R. 4, 5 and 6, Vol. I) consists of one count[1] and charges that your petitioners conspired with each other, Bioff, Browne and Circella and persons unknown, to violate the statute[2] known as the Anti-Racketeering Act Section 2 (a), (b), (d) of the Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, Section 420a (a), (b), and (d), of Title 18 United States Code.

The conspiracy is alleged to have been a continuing one from June 18, 1934 (the date of the passage of the Act), to the return of the indictment March 18, 1943.

The indictment charges, in the language of the Act, that in connection with and relation to acts affecting foreign and interstate trade and commerce, the defendants conspired to obtain, by the use of and threat to use, force, violence and coercion, the payment of over a million dollars, from a group of corporations, referred to as the victims, including

LOEWS, INC.,
PARAMOUNT PICTURES, INC.,
TWENTIETH CENTURY FOX FILM COMPANY, and
WARNER BROS. PICTURES, INC.,

1a We have copied the opinion of the Circuit Court as an appendix to our brief. To which we have added notes, designed to show how wrong and unjust it is.

1 We have copied the indictment in full, as an appendix to our brief.

2 We have copied the Statute as an appendix to our brief.

and other firms, persons and corporations whose names are to the Grand Jurors unknown,

It is alleged that Browne, Bioff, Circella and Kaufman were connected with a labor union, *i. e.*, the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, called the IATSE.

> That the victims were engaged in interstate commerce in the production, distribution and *exhibition* of motion pictures, that the defendants would dominate, control and direct the IATSE, that the million dollars would be obtained with the consent of the victims, induced by wrongful use of force and fear by demanding that the victims pay for *protection*, viz., to prevent and dissuade the defendants from restraining, impeding and obstructing, interstate distribution and *exhibition* of motion pictures throughout the United States and otherwise injuring and destroying the business of the victims. (Italics supplied.)

Preliminary Motions.

A written demurrer and motion to quash (R. 14, Vol. I), a special plea in bar (R. 19, Vol. I) and a motion for a bill of particulars (R. 28, Vol. I) and a motion for severance (R. 45, Vol. I) were presented in due course. All of these motions were decided against the defendants. (R. 37, Vol. I)

Disposition as to Defendants in Trial Court.

Ralph Pierce was directed out of the case at the conclusion of the evidence. (R. 7d, Vol. I) Frank Nitti died before the trial and the case was dismissed as to him. (R. 7b, Vol. I) Kaufman was sentenced to seven years imprisonment and to pay a fine. The remaining defendants received the maximum sentence, ten years and ten

thousand dollars fine. Your petitioners are in the penitentiary, bail having been denied upon the day of judgment.

The Evidence.

George Browne (R. 1014, Vol. II, fol. 3042) was International President of the labor union. In the various local unions, members worked at the operation of moving picture machines and, in Hollywood, various craftsmen, members of the union, were engaged in the production of moving picture films. Before Browne was elected in 1934, the former International President had lost a strike in Hollywood. The loss of this strike is explained by the fact that other unions failed to cooperate. Instead of forcing their demands upon the employers, the strike failed and resulted in a loss of membership to the IATSE. The then President lost prestige and Browne was elected without opposition.

It appears that during all of the time in question, the employers and employees in Hollywood had been working under what is known as a basic agreement. The representatives of Employers and Labor met annually and formed an agreement. Wages and working conditions were settled for the period. When the IATSE lost their prestige and power, they were not included in the basic agreement with the other unions. After Browne was first elected in 1934, he appointed Bioff as his personal representative and Bioff and Browne proceeded to restore the power of the IATSE in Hollywood by the following method.

The producers in Hollywood are so closely connected with the exhibitors that neither the producers nor the exhibitors could withstand a strike in the Chicago theaters. Bioff and Browne took advantage of this tie up, by exerting pressure upon the exhibition end of the entire struc-

ture. They called a strike against the exhibiting chain in Chicago in 1935. This strike lasted only a few hours and was sufficient to cause the executives of the producers to run to Bioff and Browne to find out what they must do in order to stop the strike and avert further labor trouble. Bioff and Browne demanded that the IATSE be restored to power in Hollywood and forced this, and many other advantages, for the International Union.

Subsequently, Bioff and Browne took advantage of the power of the position they found themselves in after their jurisdiction was restored, and collected large sums of money from those engaged in the production, distribution and exhibition of moving pictures.

Browne and Bioff were prosecuted and convicted of the substantive offense, prohibited by the Anti-Racketeering Act before the return of this indictment. After their conviction, they appeared before the grand jury and in this trial as witnesses for the prosecution. They furnished evidence of circumstances from which the jury found that these defendants were guilty of the conspiracy charged. The defendants did not take the stand. The defendants called some witnesses and contested some of the facts at the trial. Your Honors, of course, are not requested to weigh the evidence.

One Barger testified that he operated a burlesque theater in Chicago. He was an exhibitor of motion pictures. He carried some of your petitioners on his payroll. Although he testified before the grand jury, he was not named or described as one of the victims.

One Rio was said to be one of the leaders of the conspirators and much is made of what Bioff testified that Rio said and did. Rio also was known to the grand jury, yet Rio was not named as a conspirator.

The date alleged is the date of the passage of the Act, the evidence showed a date of formation weeks before. The place of the formation of the conspiracy was Riverside, a suburb of Chicago, Illinois. As we have said, the conspiracy was alleged to be a continuing one. The evidence took a wide range, as to time, place and persons.

Your petitioners were transported from home across the continent for trial in New York, a jurisdiction foreign not only to them, but to nearly all of the witnesses. This injustice was accomplished by a direct positive and false allegation that your petitioners formed a conspiracy in New York. Every conceivable motion for relief was made without success, and finally a record on appeal was presented to the Circuit Court disclosing a fatal variance between the indictment and the proof as to venue. The record here shows further that the grand jury knew that the venue allegation was false. The government never claimed to have any evidence in support of the venue allegation. Not the slightest effort was made by the government officials to excuse or justify this breach of the constitutional rights of your petitioners (the record shows the proceedings in full), and the Circuit Court has not only sanctioned this departure by the trial court, but has dismissed our complaint as trivial and of no importance.[3]

This prosecution is based upon a statute, as we have said, relating to interstate commerce. Without acts relating to interstate commerce, your petitioners should have been discharged.[4] There is no proof of any act relating

[3] Your Honors will not find the word venue mentioned in the opinion. This failure to state our point was not a mere oversight. (Petition for Rehearing, R. 4213, Point Ten.)

[4] The prosecution was founded upon circumstantial evidence, therefore it became necessary to prove the acts in order to establish the agreement to act. The crime prohibited was consummated, if it was committed at all. We are not concerned here with any attempt.

to interstate commerce.[5] A strike upon local exhibitors of motion pictures developed the pressure, which coercion produced the money. The trial court erroneously regarded the question of interstate commerce as one of law and decided it in favor of the government (R. 3722, Vol. IV, fol. 11, 166). The Circuit Court fell into the same error and decided the point probably in opposition to applicable decisions of in this court [6] and contrary to the decision of a special court upon the subject.[7]

The statute contains an exception in favor of union labor which has been construed, to some extent, by this court.[8] In the case at bar all the money was obtained by bona fide union[9] representatives.[10] Your petitioners did not obtain any money directly. They had no dealings whatever with the victims. They made no threats and exercised no coercion. They acted entirely through the union agents. Your petitioners might be said to have been undisclosed principals on the government theory.[10a] A proper construction of the Act, as indicated by this court [11] would have required the trial court to do one of two things:

(1) to hold that the exception gave immunity as a matter of law, or

(2) to hold that this case presented a mixed ques-

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[5] We hope to make it clear that we are not disputing the facts proved. We agree with the Circuit Court that the facts in reference to this feature were undisputed. (Petition for Rehearing, R. 4210, Point Three.)

[6] Pennsylvania Company v. Donat, 239 U. S. 50; Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230.

[7] Fox Film Co. v. Trumbull, 7 Fed. (2) 715.

[8] United States v. Local 807, 315 U. S. 521.

[9] International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada affiliated with the American Federation of Labor and known as the IATSE.

[10] Those who obtained money were as follows: Browne, President of the union and a vice president of the American Federation of Labor. Bioff, his accredited assistant, and one of the defendants, Kaufman, a local union representative. (Kaufman disputes the matter.)

[10a] That is they were in fact undisclosed until certain hearsay and state of mind testimony was improperly admitted.

[11] United States v. Local 807, 315 U. S. 521.

tion of law and fact to be decided by the jury under guidance as to the law from the court.

The trial court did neither. It decided the issue as one of law in favor of the government (R. 3735, Vol. IV, fol. 11, 293).[11a] The Circuit Court sanctioned this departure by reliance upon a decision in another circuit[12] and by disregarding and refusing to heed a more recent applicable decision of this court.[13]

The trial court permitted the victims to give hearsay evidence as to what they had in their mind at the time they paid the money (R. 1355, Vol. II, fol. 4064; R. 1467, Vol. II, fol. 4401; R. 1556, Vol. II, fol. 4668; R. 1660, Vol. II, fol. 4978; R. 1728, 1799, 1801, Vol. II, fol. 5401). These conclusions were expressed, for the first time, some years after the event. In substance, the witnesses claimed that they feared murder, bombings, violence and ruination which a strike would entail. The trial court erred in believing that a case in the New York circuit[14] decided the point in favor of the government (R. 961, Vol. II, fol. 2881). The case relied upon is easily distinguished from the case at bar.[14a] The Circuit Court sanctioned the departure by the trial court contrary to and without a mention of the controlling decision upon the point rendered by this court.[15] The judges of the Circuit Court disagreed among themselves concerning whether the rule of evidence

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[11a] We have appended the charge of the Court to our brief. To which we have added notes showing the numerous errors sanctioned by the Circuit Court.

[12] Nick v. United States, 122 Fed. (2) 660 (C. C. A. 8).

[13] United States v. Local 807, 315 U. S. 521.

[14] Greater New York Live Poultry C. of C. v. United States, 47 Fed. (2) 156.

[14a] We have distinguished the New York Poultry case in our brief.

[15] United States v. Local 807, 315 U. S. 521.

should be any different in conspiracy than in cases where the substantive crime is charged.[16]

Some of your petitioners did nothing within three years of the indictment. If your petitioners were ever in the conspiracy, it was a fair debatable question for the jury as to whether some of your petitioners had withdrawn. The trial court ruined this defense by telling the jury that if other defendants committed acts within three years, none of your petitioners could avail himself of the statute of limitations (R. 3733, Vol. IV, fol. 11, 199). The Circuit Court sanctioned this departure.[17]

The trial court explained to the jury the right of your petitioners to a review (R. 3712, Vol. IV, fol. 11, 136), contrary to the established practice. This departure was sanctioned by the Circuit Court without any mention of the error.[18]

The prosecutor, in his argument (R. 3611, Vol. IV), recognized no bounds. The trial court refused to make the slightest effort to protect your petitioners against the prejudice improperly created.[19] Among other things, the prosecutor asked the jury to help him in his contemplated prosecution of other persons, said by him to be the higher ups, by returning a guilty verdict against your petitioners (R. 3710, Vol. IV, fol. 11, 129). The evidence disclosed that after the principal witnesses for the government in the case at bar had been convicted, they de-

16 We submit that your Honors have held the evidence is improper (United States v. Local 807, 315 U. S. 521) and that your honors' decision should control in conspiracy and also where the substantive crime is charged.

17 This sanction is made without a correct statement of our point in the opinion of the Circuit Court. (Petition for Rehearing, R. 4215, Point Fourteen.)

18 Although called to the attention of the Circuit Court again on petition for rehearing (R. 4215, Point Seventeen).

19 We have quoted numerous instances of the misconduct of the prosecutor from the record, in an appendix to our brief.

cided to help to prosecute your petitioners. The prosecutor explained to the jury that a guilty verdict might cause some of your petitioners to turn informers. This misconduct, on the part of the prosecutor and failure of duty on the part of the trial court, was approved by the Circuit Court.[20]

After the jury had retired to deliberate, the trial judge visited the jury room in the absence of your petitioners and the attorneys (R. 3744, Vol. IV, fol. 11, 232). The Circuit Court concluded that this was a mere "informality" in this case, which "informality" did not prejudice your petitioners. This decision, we submit, is in conflict with the holdings of this court.[21] The Circuit Court said that it appears with certainty that no harm had been done. This is not true, because the record is silent, through no fault of your petitioners, as to what transpired while the judge was in the jury room. Your petitioners and their counsel knew nothing of this visit until the judge said from the bench that he had "stopped in the jury room" (R. 3744, Vol. IV). The certainty of the Circuit Court, in the absence of proof, that no prejudice resulted is in conflict with a decision on the point in another circuit.[22]

The trial consumed over eleven weeks, and the record contains over four thousand printed pages in five volumes. We have endeavored to indicate that the questions involved do not require consideration of the evidence in

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[20] Here again the Circuit Court did not see fit to state the nature of our complaint. It dismissed the entire matter by holding that the prosecutor was within "permissible limits." (Also see Petition for Rehearing, R. 4217, Point Nineteen.)

[21] Mattox v. United States, 146 U. S. 140, 150, Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 81.

[22] Little v. United States, 73 Fed. (2) 861 (C.C.A. 10) holding that there should be no communication between court and jury except in open court and discussing the effect of error (867):

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

detail,[23] they remain after your Honors assume, as required, the truth of every fact upon which there is any testimony for the prosecution. The Circuit Court said that we relied upon a claim that there was not enough evidence to support the verdict, and this was our most important point. We did not regard the insufficiency of the evidence as our most important point.[24] We merely tried in vain to convince the Circuit Court that the errors committed in the admission of evidence in the instructions and the misconduct of the prosecutor contributed to the result which might otherwise have been not guilty. We cannot afford to allow the misstatement of our position[25] by the Circuit Court of Appeals to go unchallenged for fear that we do not make it clear here that we come with points requiring the attention of this court.

The Exhibits.

Volume five is taken up largely with exhibits which are of no importance here. They relate mostly to the bookkeeping methods of the victims in obtaining the money for Bioff. Your petitioners had no dealings with any of the victims but Barger, and the fact that Bioff obtained money was never disputed.

B.

Basis of the Court's Jurisdiction.

This Court may by certiorari have this case certified to it for determination under the act of February 13, 1925, 43 Stat. 936, Ch. 229, Title 28 United States Code, § 347,

[23] Your Honors might obtain the entire picture of the case, if considered necessary, by reading the direct examination of the witness Bioff, (R. 100, Vol. I).

[24] Petition for Rehearing, R. 4206, Point Sixteen.

[25] Your petitioners did not delude themselves that the Circuit Court would review the finding of the jury as to the facts.

amending and re-enacting Sec. 240 (a) of the Judicial Code. (Appendix to Rules 306 U. S. 727, 731.) Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716, and Rules for Criminal Appeals, promulgated May 7, 1934. Rule XI.

The opinion in the Circuit Court of Appeals was rendered December 20, 1944 (R. 4191, fol. 4191). The petition for rehearing, filed within the time allowed, was denied on January 8, 1945, (R. 4202, fol. 4241). The judgment and order for mandate was entered January 11, 1945, (R. 4203, fol. 4243).

C.

Questions Presented.

Venue.

1. In a criminal prosecution where it appears that the defendants have been removed from the district of their home for trial and the only allegation as to venue is a charge that the conspiracy was formed in the district of trial, can the conviction be sustained where the undisputed evidence shows the formation of the conspiracy in the district from where the defendants were removed.

Is the answer to this question affected by evidence showing that some of the conspirators performed acts within the district of trial in furtherance of the conspiracy if it be kept in mind that there are no overt acts alleged, and that the performance of such acts are not referred to in the pleading?

Exception.

2. The Act makes certain exceptions in favor of union labor. Where labor officials are charged with a violation, is it proper for the trial judge to decide, as a matter of law, that the exceptions do not apply, or must the question be submitted to the jury under proper instructions?

a. In a case where the evidence shows that the labor officials used legitimate union demands, coupled with the threat of strike, in order to obtain money for their personal use, while at the same time securing benefits for the union members, can the trial judge determine, as a matter of law, that the tainted objectives of the union officials eliminates all consideration by the jury of the exception, or must the entire matter be left to the jury under proper instructions as to the exceptions?

b. When it is made to appear in a prosecution under the Act that the money was obtained by duly elected union labor officials of a legitimate labor union, should the trial judge direct a verdict, regardless of the further showing that the officials have been false to their union and have used the power of the union to obtain money for their own use?

c. In view of the fact that the legislative history of the Act shows that it was intended to suppress terroristic activities of professional gangsters and not to interfere with traditional labor union activities, how is the law to be applied where money is obtained by union officials who do not disclose that any one else is concerned and where the employers pay over the money because they fear that the union officials are capable of using a strike, coupled with violence, under the pretense of a demand for wages, and it is revealed, after the event, that undisclosed persons were behind the scenes and were profiting by the shakedown. Should the trial judge submit such a case to the jury under proper instructions as to the meaning of the exception, or is it lawful for the judge to determine, as a matter of law, that the exception does not apply?

d. To put the question in the language employed by the Circuit Court of Appeals, if the accused at bar were not

concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen, but to feather their own nests, did they "coerce" their victims within the meaning of the section?

e. If the evidence can be so construed, is it proper for the judge to take the matter of the exception from the jury?

f. Would the answer be affected if wage disputes and benefits to workmen were shown by the evidence and the desire for money on the part of the labor officials was only one of several objectives?

g. In a case where the union members are ready and claim to be able to do the work but the employer prefers to employ a substitute, and is coerced to pay the union members wages to stand by, does the Act apply, and who determines if a crime results, the judge or the jury?

h. If instead of wages being paid the employers and the union officials agree upon a lump sum, does such method of settlement alter the situation?

i. Does it matter, in any of these cases, whether the union official turns the settlement money into the union or keeps it? Would the fact that he kept the money and divided it with persons not members of his union alter the situation? Here again is the final decision in the hands of the judge, as a matter of law, or should it be submitted to the jury?

j. If a union official is in a position to force the employer to employ more men for a particular job (two men in a booth) and the official takes money instead of enforcing the union demand and the proof shows that the employer paid the money because of his fear of a strike, can the trial judge hold, as a matter of law, that the exception in the act does not apply, or should the judge submit the matter of the exception to the jury? Or should the

judge hold that no crime has been committed under the Act, by reason of the exception, and in such case should the judge order an acquittal?

k. Were these defendants tried in a manner consistent with the proper meaning and scope of the pertinent provisions of the Act?

l. Did the trial court fail to instruct the jury properly with respect to the exception?

m. Where it appears from the evidence that a labor organization of good repute and honest purpose has been misdirected and has become an agency of blackmail, is it proper for the trial judge to determine, as a matter of law, that the exception does not apply, and to hold that the jury should not be informed of it?

n. Did Congress intend that the labor officials, false to their trust, should be immune, in order to prevent the use of the Act against traditional labor methods?

o. Did Congress intend that the labor officials should not be immune, but that a jury should determine whether or not in each case their activities were illegal under the Act?

p. What are the limits of the exception, assuming the presence of violence and threats, where the prosecution is against officials of a union of good repute and honest purpose, where it appears that the officials combine the securing of benefits for the union with obtaining money for themselves?

State of Mind.

3. In considering the above question, is the test of the applicability of the exception in such case the objective of the conspirators or the state of mind of the victims?

a. How is the fear of the employer and his reasons for payment to be established, by facts and circumstances, including conversations with the extortionists at and before the payment, or is it proper to add the feelings and state of mind of the victim as described by him at the trial? If this state of mind evidence be admissible, is it also proper for the victim to narrate his experiences in the past as to the result of strikes, including violence, murders, bombings and damage to his property and business, in order to fully show his state of mind? Is hearsay evidence not connected with the conspirators proper in order to show the knowledge and state of mind of the victim?

b. In considering the admissibility of such state of mind testimony, does it make any difference whether the defendants are charged with the substantive offense only, or with a conspiracy? The judges below divided upon this question.

Interstate Commerce.

4. In a prosecution for conspiracy under the Act, must the agreement include the contemplated performance of an act relating to interstate commerce? The trial court recognized that the answer here is yes; so did the Circuit Court. We state the question as preliminary.

a. Should the language of the statute be taken literally and applied to "any act in any degree" and thus be made to include strikes on local theaters?

b. Do acts relating to the exhibition of motion pictures come within the statute?

c. Is the exhibition of moving pictures interstate commerce, as a matter of law?

d. Is it proper to instruct the jury that the exhibition

of motion pictures is an engagement in interstate commerce?

e. After the trial court and the Circuit Court of Appeals has held that the exhibition of motion pictures is interstate commerce, as a matter of law, is it proper for this court to re-examine the question, and, if warranted, to hold to the contrary?

f. In the case at bar, was this a mixed question of law and fact which should have been left to the jury, under proper instructions?

g. Can the Act be made to apply, as a matter of law, to local conditions, because a strike on a local theater would cause the producers to feel a check upon the interstate movement of their films when the exhibitors are tied up?

h. Can the Act be made to apply, as a matter of law, to a strike on a local theater because the exhibitor did business on a small margin and must have a constant supply of films to keep going at all, and a very short cessation of that supply at the source might destroy the exhibitor and end him forever as an outlet, and thus diminish the business of the producer? Assuming, of course, that the producer is engaged in interstate commerce as to the film.

i. Is it proper to hold, as a matter of law, that the moving picture industry is a unity, that all parts are like those of a single elastic member in which an impact on one part is instantly transmitted everywhere so that therefore any act relating to the exhibition of moving pictures is an act prohibited by the Act and relates to interstate commerce, as a matter of law?

j. Is it proper to instruct the jury that interstate commerce is involved, when it is permissible, from the un-

disputed facts, to conclude that there was no interstate commerce as to the exhibition of moving pictures?

Statute of Limitations.

5. Is it proper for the court to take from the jury the defense afforded by the statute of limitations?

a. Is it proper for the court to instruct the jury, as to conspirators who may have withdrawn, that any act of their co-conspirators (including the accomplice witnesses) within three years will destroy the defense as to all?

Hearsay.

6. May a defendant be connected with a conspiracy and convicted upon hearsay evidence?

Deception.

7. Is it proper to sustain a conviction when it appears from the entire record that the prosecutor purposely adopted a course calculated to deceive the defendants as to that which they were to meet and relief has been denied below? The scheme of the prosecutor is revealed by the record which discloses:

a. A false allegation as to venue.

b. A date which is obviously not one to be relied upon.

c. A mere conclusion that the conspiracy was a continuing one, covering a long period of years from some unnamed beginning to the return of the indictment.

d. An indictment which merely follows the language of the Act furnishing mere legal conclusions with no facts and concealing the real nature of the charge.

e. Resistance to the granting of a motion for a bill of

particulars and the refusal of any information of the nature of the charge.

f. The concealment of a known conspirator, Rio, under the false allegation that he was unknown, coupled with the fact that Rio has been dead for some years and the accomplice witness testified to a great many important transactions with him, said to bind your petitioners in their absence.

g. The concealment of Barger as a victim, when it appears that he was known to the grand jury, coupled with the fact that Barger furnished the only evidence on some important links, including the elimination of the statute of limitations.

Instruction.

8. Is it proper for the court to explain to the jury the right of the defendants to a review?

Communication With Jury.

9. May the trial court be permitted to communicate with the jury after retirement, in the absence of the defendants and counsel?

a. After the Circuit Court of Appeals has found that the judge visited the jury room, is it proper for that court to hold that this was an "informality" and that "it would be the merest pedantry to insist upon procedural regularity"?

b. After the Circuit Court of Appeals held that it appears with certainty that no harm has been done and that no prejudice to the accused resulted, will this court accept such finding or will your Honors examine the record in connection with the defendants' assertion here that the

record will not support an affirmative finding that the error was necessarily harmless.

c. Will this court hold with the second circuit, as in the case at bar, or with the tenth circuit which holds, in *Little* v. *United States,* 73 Fed. (2), 861, 867, that:

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

Misconduct of Prosecutor.

10. Were the actions, conduct, argument, methods employed and statements made by the prosecuting attorney so prejudicial to the petitioners' right to a fair trial as to call for the exercise of the power of supervision in this Court?

D.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has sanctioned a departure by the lower court from the accepted and usual course of judicial proceeding.

a. The failure to recognize at some time, before, during, or after, the trial, that the indictment was calculated to mislead and furnish no information, and calculated further to allow the prosecution to be practically unlimited in the scope and range of the evidence.

b. To permit the prosecution to transport the defendants for trial upon a false allegation as to venue.

c. To take from the jury important issues made proper by the Act relating to the conduct of labor officials.

d. To take from the jury the question as to whether interstate commerce was affected in a manner prohibited.

e. To take from the jury the defense afforded by the statute of limitations.

f. To admit improper and prejudicial hearsay evidence as to the state of mind of the victims.

g. To hold that the exhibition of motion pictures is interstate commerce and that the evidence of Barger was proper. Barger, as we have said, being not named or described as a victim, and it appearing that his complaints had no connection with the charge made.

h. To allow the admission of hearsay evidence and then instruct the jury that same could be used in connecting the defendants with the conspiracy.

i. To explain to the jury the right of a defendant to a review.

j. To enter the jury room during the deliberations of the jury.

k. To permit the prosecutor to inflame the jury and appeal to prejudice and depart from all known rules of procedure in the presentation of evidence and in argument.

2. The Circuit Court of Appeals has decided federal questions in a way which conflicts with the decisions of this court.

a. This court has indicated, as to each of the above departures, that they are not consistent with justice and a fair trial. We know of no case in which your Honors were called upon to deal with so many departures in one trial.

b. The Circuit Court of Appeals decided many questions, presented herein, in conflict with the decision of this court in *United States* v. *Local 807*, 315 U. S. 521. The Circuit Court of Appeals does not even mention the decision of this court and does cite and follow the case of *Nick* v. *United States*, 122 Fed. (2) 660, upon points which

were decided to the contrary by this court in the more recent case of *United States* v. *Local 807*, 315 U. S. 521.

c. In holding that the exhibition of moving pictures is interstate commerce, the Circuit Court not only ignores the case of *Fox Film Co.* v. *Trumbull*, 7 Fed. (2) 715, but decides the point contrary to the decision of this court in *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230. Also in *Schecter Poultry Corporation* v. *United States*, 295 U. S. 495.

d. In holding that the question of interstate commerce may be taken from the jury, the Circuit Court conflicted with the decision of this court in *Pennsylvania Company* v. *Donat*, 239 U. S. 50.

e. In holding that the jurisdiction of the federal court is extended to every local theater strike, the Circuit Court here conflicted with that which was said by this court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

f. In holding that the entry of the judge into the jury room during its deliberations is a mere informality, the Circuit Court decided the point in a manner probably in conflict with the decisions of this court.

g. In holding that the prosecutor was within permissible limits in his argument, the Circuit Court conflicted with the decision of this court in *Berger* v. *United States*, 295 U. S. 78.

3. The decision of the Circuit Court of Appeals is wrong.

a. The Circuit Court of Appeals answered each question presented herein contrary to the law and justice.

4. Conflicts exist between various circuits in the Circuit Courts of Appeals upon points involved here.

a. The Circuit Court, in the case at bar, conflicted with *United States* v. *New York Great Atlantic and Pacific Tea Company*, 137 Fed. (2) 459 (C.C.A. 5), in holding that the variance as to venue is unimportant.

b. The Circuit Court here conflicted with *United States* v. *Riley*, 74 Fed. 210 (C.C.A. 6) in holding that a variance as to the victim (Barger) was trivial.

c. Upon the matter of proper instructions to the jury on the subject of the statute of limitations, particularly as to those who might have withdrawn, the decision of the Circuit Court in the case at bar conflicts with *Buhler* v. *United States*, 33 Fed. (2) 382 (C.C.A. 9).

d. In refusing to properly instruct that the burden was upon the government to prove interstate commerce the decision of the Circuit Court here conflicts with *McAdams* v. *United States*, 74 Fed. (2) 37(C.C.A. 8).

e. Upon the effect of error committed by an outsider communicating with the jury after retirement, the Circuit Court here conflicts with *Little* v. *United States*, 73 Fed. (2) 861 (C.C.A. 10). There is a conflict among the various circuits as to the effect of this error and particularly the construction of Section 391 of Title 28 U.S.C. The conflicting cases are cited and summarized in *Little* v. *United States*, 73 Fed. (2) 861 (C.C.A. 10).

5. If the prosecution is to be permitted to sustain a false allegation of venue, any citizen may be transported for trial into the district thought to be to the advantage of the government.[26]

a. A reading of the decisions of the federal courts will bear the conclusion that the government officials have

[26] A defendant will be compelled to go through a trial in each instance, and then claim a variance. The indictment will always be good on its face.

prosecuted chain stores in Texas,[27] where such business is not in favor; the oil companies in Wisconsin[28] where the petroleum industry has the least business and here they take those charged with racketeering to New York, where market conditions in food and clothing have become a public scandal.[29] This court should recognize the importance of the fact that if the courts are to hold public confidence, they should not only avoid evil, but that they must avoid the appearance of evil. In the case at bar the trial court overruled all motions without requiring the prosecution to furnish any reason, good or bad, as to why New York should be selected, and by what right, under the law, the government should be permitted to prosecute a Chicago group in New York. The Circuit Court dismissed the matter as trivial. This court should feel bound to justify such practice if it be correct and legal, or to condemn it and uphold the constitution, if it be wrong. The power of supervision here is required for the reason that the courts below failed in their duty to either uphold the scheme and support the government upon legal grounds if any such could be found, or to rule with your petitioners. Evasion is harmful to the public reputation of judicial proceedings.

6. The constitutional rights of a defendant to be informed of the nature of the charge should not be nullified by permitting this conviction to stand, after it is found that not only was the venue allegation false, but the indictment was also false as to that which was known to the grand jury as to the conspirators and as to the victims. It furnished no reliable information as to date, time, place or persons.

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[27] United States v. Safeway Stores, 51 Fed. Supp. 448.

[28] United States v. Socony Vacuum Oil Co., 310 U. S. 150.

[29] Greater New York Live Poultry C.C. v. United States, 47 F. (2) 156.

7. If this conviction is to be sustained, it means that a federal judge has a right to consider the conduct of a labor official and decide, as a matter of law, that the federal courts have jurisdiction, and that the exception does not apply, and to decide further that the jury should not hear of the exception.

a. The question important to the public generally and to millions of laboring people, presented here, is of far more importance than the fate of these defendants. The Circuit Court indicated that the result was correct here and the manner in which it was arrived at is of no importance. This court should exercise its supervisory powers not only to correct the errors committed, but to furnish a correct guide for future action. Did Congress intend that a federal judge should have the final say as to the objectives of the elected officials of accredited unions? Your Honors know very well that in every conflict between employer and labor, some evidence could be produced, to satisfy the mind of the employer at least, that the labor official had been false to his trust and that his asserted objective as to labor gains was a mere pretense. It is of vital importance that the labor official, good or bad, be afforded a jury trial and that the judges know how to apply the law in future actions.

The decision of this court in *United States* v. *Local 807*, 315 U. S. 521, does not answer all of the questions presented here. Did Congress intend that a federal judge should nullify the exception when the labor official conspires with others not in his union, and he "feathers his nest" by virtue of his power to call a strike? This we submit is an important question of great public interest.

8. We submit that if the trial judge is correct in the case at bar, every local strike in the moving picture industry would be brought within the jurisdiction of the federal

courts, if it be claimed by the employers that they paid money in fear of the power of a union or its officials.

a. Considering the constitutional barriers and the broad language of the Act, this presents an important question of federal jurisdiction.

9. If the Act is to be construed as in the case at bar by the trial court and the Circuit Court of Appeals, it is unconstitutional and not within the power of Congress.

a. This court held that the Act was within the power of Congress in *United States* v. *Local 807*, 315 U. S. 521, but in that case trucks were passing state lines and there was no occasion to consider the extent of its application to local affairs, such as the exhibition of motion pictures. A decision upon this point would control in many other industries.

E.

Prayer.

Your petitioners have filed the record of the Circuit Court of Appeals in this case and have complied with the rules of this court in all other respects and pray that such orders be entered as may be required for your Honors to take jurisdiction by certiorari, and that the judgment be reversed and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Respectfully submitted,

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE,
and JOHN ROSSELLI,
Petitioners,

by WM. SCOTT STEWART,
Counsel for Petitioners.

February 7, 1945.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,
Petitioners,

vs.

UNITED STATES,
Respondent.

BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

SUBJECT INDEX.

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Summary of Argument—

Point One. Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district.

This indictment does not comply with rules of pleading which require facts and not unsupported legal conclusions.

The language of the statute alone here is not sufficient.

The indictment, on its face, shows that the conspiracy cannot be prosecuted because of the Statute of Limitations.

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The allegation that something was continuous is a mere legal conclusion and should be rejected, there being no facts or description given to indicate any such conspiracy.

Considering the indictment with the evidence, it cannot be said that a continuing conspiracy was proved. The question was taken from the jury in charge.

Considering the indictment with the evidence, it cannot be said that the Statute of Limitations did not run. This question was also taken from the jury.

Matters known to the grand jury were alleged to be unknown.

Considering the indictment with the evidence, it is apparent that the prosecutor deceived the defendants as to the charge, gave them no accurate information and the prosecutor anticipated his desire for unlimited range in his proof 14

Point Two. The Act provides that it should not apply to organized labor. This being a circumstantial evidence case, it was necessary to prove what was done in order to prove that which was agreed upon. All the contacts between the victims and the conspirators were through labor representatives. Whether the exception applied became a mixed question of law and fact. The trial judge erred by instructing the jury that labor was not involved and by refusing to even refer to the exception. The case was tried as if the exception had never been incorporated in the Act. This met the approval of the Circuit Court in opposition to an applicable decision of this Court 31

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Point Three. The undisputed evidence showed that the acts related to the exhibition of motion pictures. The trial court regarded the exhibition of motion pictures as interstate commerce, as a matter of law, and so instructed the jury. The Circuit Court preferred to follow another circuit opinion in order to approve this error and at the same time rejected applicable decisions of this Court 42

Point Four. The courts below applied the literal meaning of the Act to make it apply to the exhibition of motion pictures and in such manner as to make the Act govern every state activity. Congress did not intend any such construction and if Congress did so intend, the Act is unconstitutional. Here too the Circuit Court rejected applicable decisions of this Court and gave preference to a decision in another circuit.. 51

Point Five. The trial court allowed the victims to tell what they feared and why they paid the money. This state of mind testimony was given years after the event and included what the victims had heard of the defendants since it was discovered that they were in the picture. It included hearsay evidence as to property damage, bombings, murders, which had been caused in the past during strikes. Strikes with which the defendants were not even thought to have been connected. The Circuit judge who wrote the opinion thought that this was error but to him it seemed harmless and did not prejudice the defendants. The other two judges thought that there was no error. All three judges ignored an applicable decision to the contrary in this court 53

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Point Six. Barger ran a burlesque house in Chicago. He was falsely designated as unknown to the grand jurors. Bioff forced a partnership upon Barger which originated with Barger's desire to stifle competition. D'Andrea was paid a salary by check although he did not work at the theater. The theory of the government was that this was paid pursuant to the conspiracy charged. The defense claimed that this was money paid for protection as against local police. In any event, it all had no connection with interstate commerce further than the fact that Barger exhibited motion pictures. The Circuit Court adopted a rule which would put the corner policeman into a national conspiracy upon receipt of money from Barger, if the policeman agreed to permit Barger to run an indecent show, sandwiched in with a moving picture 61

Point Seven. The trial court told the jury that there could be no defense for your petitioners under the Statute of Limitations if anybody, including the accomplice witnesses, did anything within three years, no matter whether the statute had already run as to your petitioners or not. The Circuit Court approved..... 64

Point Eight. The judge told the jury, in his charge, that he had to be careful because all was being taken down and if he made any mistakes they could be reviewed upon an appeal, that in such event the case might come back. Naturally the jury understood that a conviction would not be permitted to stand by the Circuit Court if the judge turned out to be wrong in his charge. The judge was in error but the Circuit Court did nothing 68

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Point Nine. No adequate summary possible, please see excerpts from record in Appendix p. 11.... 69

Every possible device was resorted to in order to slur and prejudice the defendants. The following is a partial list of the instances of which we complain.

The prosecutor said, in substance, that theater owners are vulnerable to acts of vandalism and violence because anybody, by payment of admission, can walk into a darkened theater. Damage to theater property means injury to the public. This was based entirely upon state of mind testimony which had been improperly admitted.

In his argument, he referred to the testimony of Coston and dwelt upon murders, bomb throwing and damage to theaters in 1931. Some shakedown money had been secured by Malloy who preceded Browne in control. This was not only state of mind testimony but was entirely unconnected, yet charged up to your petitioners.

The prosecutor testified in his argument that he had been to Chicago and had observed the operation of theaters.

In his argument, he criticised the basis used by the union in arriving at a wage scale.

He condemned any defense which the statute of limitations might afford by summarizing it to the effect that the criminal says you have caught me too late.

After the court had stricken evidence as to a conversation between an attorney, Korshak,

and Bioff because the prosecutor had failed to connect the defendants, the prosecutor proceeded to base an appeal to prejudice upon this testimony which had been stricken. He told the jury that these defendants instructed Bioff to perjure himself in his trial. An untruth which excused the accomplice and blamed your petitioners.

After the court ruled that the evidence of a deposit made by union officials to the credit of a baby born to Mrs. DeLucia was immaterial, and the prosecutor prevailed upon the court to admit the evidence for a limited purpose—to show control of the union—he made use of the evidence in an appeal to prejudice.

The prosecutor argued that Bioff was convicted of pandering while in the employ of D'Andrea, thereby implying that D'Andrea was in a reprehensible business. Also that D'Andrea assisted Bioff in making false representations to an insurance company. No relationship or connection was shown as to D'Andrea.

He argued, without any basis in the evidence, that some of the defendants were muscle men delegated to the convention to make sure that everything went right.

The prosecutor inferred without any evidence, that some of these defendants threatened the life of Sherman.

He said that the convention hall was policed by some of these defendants. He did not have a scintilla of evidence upon which to base this charge.

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The prosecutor appealed to prejudice by an argument based upon the relationship between Sherman and one Lepke, having no connection with these defendants and having nothing to do with the charge.

The prosecutor made reference to Al Capone and assassination which had nothing to do with this case.

The prosecutor appealed to prejudice by an unwarranted argument to the effect that this mob, as he called your petitioners, decided to kidnap the Actors' Union, and to give it to one of the defendants to play with. The evidence of the transaction had no place in the record, and it did not bear the insinuation.

The prosecutor unjustly and with no evidence at all accused Rosselli of shaking down Casey. Casey was in the employ of the magnates and not produced.

The prosecutor appealed to prejudice as against Rosselli because he happened to have been a guest in the Florida home of the Capone family, while Al Capone was in the penitentiary. Al Capone had nothing to do with the conspiracy charged, and it was unfair and prejudicial to call your petitioners Capone gangsters without any proof. This is a term easily applied to anyone we don't like, and is used in the manner employed in politics by calling the other fellow a communish without basis.

The prosecutor placed McLane upon the stand knowing that McLane had no informa-

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tion material here, merely in order that the prosecutor might argue that McLane was afraid to testify. McLane had been head of the bartenders in Chicago and to suit his own purposes, he claimed that some of your petitioners had tried to defeat him in election. This had no connection with the conspiracy charged here.

The prosecutor requested the jury to convict these defendants in order that he might secure some of them at a future trial as witnesses against higher ups. The record shows that the judge has held the term open for three years, and that those of your petitioners playing minor roles, if guilty at all, were sentenced to the maximum and denied bail. If the prosecutor has had an ulterior purpose all of the time, the jury and the court should not be concerned and the jury should not convict with the hope that a defendant might obtain immunity and receive the treatment accorded other accomplice witnesses in the case.

Point Ten. After the jury had been out and had sent notes to the judge indicating an inability to agree and a failure to remember certain testimony, the judge, according to his own statement, stopped in the jury room. The Circuit Court designated this as a mere "informality" and concluded, without foundation, that no harm was done. In another circuit it has been held that where the record fails affirmatively (as here) to disclose that no prejudice did result, the verdict cannot stand..... 78

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Point Eleven. The Circuit Court, in the case at bar, improperly failed to state some of the points involved and incorrectly stated others and rendered an opinion which does not disclose the grounds of decision..... 85

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Please also see

APPENDICES

The Anti-Racketeering Act, therein p. 3.

The Indictment in Full, therein p. 7.

Argument of Prosecutor, excerpts, therein p. 11.

Charge of Trial Court and Refused Instructions, therein p. 37.

Opinion of Circuit Court, therein p. 85.

Opinions of the Courts Below.

The trial judge filed no opinion. The opinion of the Circuit Court of Appeals before Judges Hand, Swan and Clark as written by Mr. Justice Learned Hand, not yet reported, is in the record (R. 4191). We submit herewith an appendix showing (therein p. 85), among other things, a copy of the opinion together with our notes calculated to show its errors of commission and omission.

Jurisdiction.

In conformity with the practice in the second circuit, no judgment was entered at the time of the filing of the opinion on December 20, 1944 (R. 4191). We filed our petition for rehearing (R. 4206) within the time allowed and it was denied upon January 8, 1945 (R. 4202). Because the court had under advisement a motion on behalf of Kaufman for a stay, the judgment and order for mandate was not entered until January 11, 1945 (R. 4203). We file this petition in less than thirty days from the denial of the petition for rehearing on January 8, 1945 (R. 4202, fol. 4240).

The jurisdiction of this court is invoked under section 347 of Title 28, United States Code. Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 936, Ch. 229. Appendix to Rules, 306 U. S. 727, 731. Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716. Rule XI of the Rules for Criminal Appeals promulgated May 7, 1934.

Statement of the Case.

Reference is made to our Petition for Certiorari (pp. 1 to 11) for a statement of the case and also for a summary of the record, consisting of five printed volumes, submitted herewith.

The Errors Assigned.

The Circuit Court of Appeals committed error as follows:

1. In holding that the variance, between the indictment as to venue and the proof, was of no importance.

2. In holding that the variance, between the indictment and the proof of Barger as a victim, was of no importance.

3. In holding that the variance, between the indictment and the proof as to the identity of the conspirators, was of no importance.

4. In holding that there was no merit to the motion to quash made upon the following grounds: the allegation that the conspiracy was a continuing one was a mere conclusion with no facts alleged; the indictment, upon its face, showed that the statute of limitations had run; the language of the Act was not sufficient, conclusions and not facts were pleaded; no effort was made to negative the exception in the Act.

5. In holding that there was no error in the trial court based upon a showing that the grand jury actually knew about Barger, a victim, and Rio, a conspirator, and with such knowledge returned an indictment alleging that they were unknown. Of course if these persons were not referred to in the indictment the evidence as to them should have been excluded.

6. In holding that it was not error to deny a bill of particulars.

7. In holding that it was proper for the trial court to take from the jury the question as to whether the exception in the Act applies.

8. In holding that the test as to the objective of the conspirators was to be found in the state of mind of the

victims, and that the trial court did not err in admitting hearsay evidence in this regard.

9. In holding that interstate commerce was involved as a matter of law, and that the exhibition of motion pictures constitutes an engagement in interstate commerce; that the trial court did not err in taking this question from the jury.

10. In construing the Act literally and following its language to make it apply to a strike upon a local theater.

11. In holding that the trial court might properly instruct the jury that there was no defense under the statute of limitations if any defendant performed acts within the period; holding that the act of one (including the accomplice witnesses) bound all, including those who might have withdrawn.

12. In holding that hearsay evidence was properly admitted and made use of in the trial for the purpose of connecting the defendants to the conspiracy alleged.

13. In holding that it was proper for the trial judge to explain the right of the defendants to a review.

14. In holding that a visit on the part of the trial judge to the jury during its deliberations was a mere informality and that no prejudice could result.

15. In holding that the judge did not prejudice the defendants in the manner in which he read the testimony to the jury after the jury had retired to deliberate.

16. In holding that the actions, conduct, methods employed and argument made by the prosecutor was within permissible limits.

17. Your petitioners also adopt the assignment of errors filed by those convicted with your petitioners and who seek the writ of certiorari on the same record.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

Point One.

I.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed.

Article III, Sec. 2, Clause 3, Constitution of the United States.

II.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VI, Constitution of the United States.

III.

Questions of venue in criminal cases are not merely matters of formal legal procedure.

United States v. *Johnson*, ... U. S. ...., 89 Law Ed. 196.

IV.

The commission of an overt act in furtherance of conspiracy and its allegation are necessary to give local venue.

United States v. *New York Great Atlantic and Pacific Tea Co.*, 137 Fed. (2) 459 (C.C.A. 5).

See *De Mayo* v. *United States*, 32 Fed. (2) 472.

V.

Conspiracies under this Act are to be compared with those under the Sherman Act and are complete when formed. Venue can be laid in a district wherein the conspiracy is made effective, but in such case there must be a specification in the indictment of such overt acts as is sufficient for venue purposes.

See authorities collected in *United States* v. *Safeway Stores*, 51 Fed. Supp. 448 (Dist. C. Kas.), and in *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824 (C.C.A. 10).

VI.

If the history of liberty means anything, if constitutional guaranties are worth anything, this conviction can not be permitted to stand.

United States v. *Smith*, 173 Fed. 227, 232 (Dist. C. Ind.).

VII.

An indictment in the language of the Act here failed to inform the defendants of the cause of the accusation, and it was error to deny particularization or to refuse to dismiss.

United States v. *Cruikshank*, 92 U. S. 542.

United States v. *Carll*, 105 U. S. 611.

United States v. *Britton*, 107 U. S. 655.
Evans v. *United States*, 153 U. S. 584.
United States v. *Hess*, 124 U. S. 483.
Fontana v. *United States*, 262 Fed. 283.
White v. *United States*, 67 Fed. (2) 71 (C.C.A. 10).

VIII.

Persons known to the grand jurors should not be alleged as unknown.

United States v. *Riley*, 74 Fed. 210.
United States v. *Rhodes*, 212 Fed. 513.

IX.

Conspiracies under this Act are like the Sherman Act in this respect—they are complete when formed.

Nash v. *United States*, 229 U. S. 373.

X.

Venue should be laid in district where the conspiracy is formed. If the pleader wished to rely upon the law whereby in cases where the conspiracy is made effective by overt acts in the district of trial although formed elsewhere, the indictment should contain a specification of such overt acts for venue purposes.

See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

XI.

Courts have been especially meticulous and rigid in requiring particularity and definiteness in venue allegations.

Skelley v. *United States*, 10 Cir., 37 Fed. (2) 503.
United States v. *Burns*, 54 Fed. 351, 359.

XII.

The language of this indictment is too general and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed he has committed mere conclusions should be rejected.

United States v. *Colgate Co.*, 250 U. S. 300.

And see authorities reviewed in *United States* v. *Armour & Company*, 48 Fed. Supp. 801.

Point Two.

The exception in the Act cannot be ignored and the court should have construed it for the benefit of the jury as applied to the facts here.

United States v. *Local 807*, 315 U. S. 521, affirming 118 Fed. (2) 684 (C.C.A. 2).

Point Three.

I.

The exhibition of motion pictures is not interstate commerce.

Mutual Film Corp. v. *Industrial Commission of Ohio*, 236 U. S. 230.

Schecter Poultry Corporation v. *United States*, 295 U. S. 495.

Fox Film Co. v. *Trumbull*, 7 Fed. (2) 715.

II.

The Circuit Court of Appeals held that a proposition (interstate commerce) usually one of fact, was one of law and therefore the question is reviewable here.

Mahnich v. *Southern S. S. Co.*, 321 U. S. 96.

III.

Refusal to properly instruct that the burden was upon the government to prove interstate commerce was error.

McAdams v. *United States,* 74 Fed. (2) 37 (C.C.A. 8).

IV.

As in the Sherman Act cases, Congress here had no intention of disturbing the balance between state and national governments.

Apex Hosiery Company v. *Leader,* 310 U. S. 469.

V.

Whether or not under the facts shown interstate commerce was involved should have been submitted to the jury for its determination.

Pennsylvania Company v. *Donat,* 239 U. S. 50.

Point Four.

I.

It must be presumed that Congress intended to legislate within its power otherwise the Act is unconstitutional. It cannot mean any interference with commerce no matter in what degree, as held below in this case.

United States v. *Gramlich,* 19 Fed. Supp. 422.

See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

Point Five.

I.

The state of mind of the victims is not material in proof of the objective of the defendants.

United States v. *Local 807,* 315 U. S. 521.

Point Seven

I.

The withdrawal from a criminal conspiracy may be shown by circumstantial evidence.

Buhler v. *United States*, 33 Fed. (2) 382 (C.C.A. 9).

II.

Hearsay declarations cannot be used to connect a defendant with conspiracy.

Glasser v. *United States*, 315 U. S. 60.

Nibbelink v. *United States*, 66 Fed. (2) 178, (C.C.A. 6).

Minner v. *United States*, 57 Fed. (2) 506, (C.C.A. 10).

Morrow v. *United States*, 11 Fed. (2) 256, (C.C.A. 8).

III.

Circumstances which are consistent with any reasonable theory of innocence are insufficient.

Kassin v. *United States*, 87 Fed. (2) 183, (C.C.A. 5).

Graceffo v. *United States*, 46 Fed. (2) 852, (C.C.A. 3).

Dahly v. *United States*, 50 Fed. (2) 37.

Salinger v. *United States*, 23 Fed. (2) 48, (C.C.A. 8).

Tucker v. *United States*, 224 Fed. 833, (C.C.A. 6).

IV.

Those having no knowledge of the conspiracy are not conspirators.

United States v. *Falcone*, 311 U. S. 205, 210 (C.C.A. 2).

United States v. *Crimmins*, 123 F. (2) 271, (C.C.A. 2).

V.

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue.

Ware v. *United States*, 154 Fed. 577.

Point Eight.

I.

It was improper for the court to make reference to the right of review.

McDonald v. *People*, 126 Ill. 150, 153, 18 N. E. 817.

Cleveland Ry. v. *Locke*, 26 Ind. App. 269, 123 N. E. 816.

Point Nine.

I.

We have here a case where the misconduct of the prosecutor was pronounced and persistent with a cumulative effect upon the jury which cannot be disregarded as inconsequential.

Berger v. *United States,* 295 U. S. 78, 89.

Point Ten.

I.

There should be no communication between court and jury except in open court.

Little v. *United States,* 73 Fed. (2) 861 (C.C.A. 10).

II.

Where the record, as here, does not affirmatively show that no prejudice resulted, the error of communication with the jury is reversible. The burden to show prejudice is not on your petitioners and section 391 of Title 28 U.S.C. does not render the error harmless.

Little v. *United States,* 73 Fed. (2) 861.

III.

Congress, by section 391 of Title 28, United States Code, did not intend that where there have been substantial infringements on the right to a fair trial, the court of review can ignore them.

Bruno v. *United States,* 308 U. S. 287.

McCandless v. *United States,* 298 U. S. 342.

And other cases cited in dissent to *United States* v. *Liss,* 137 Fed. (2) 995, 1005 (C.C.A. 2).

Point Eleven.

Opinion Rendered Here by Circuit Court.

I.

The principle of publicity, which governs in the American judicial process, calls not only for trials held in public but also for the publication of judicial opinions that disclose the grounds of decisions; that publicity is illusory if the true grounds are not stated.

See dissent by Judge Frank in *United States* v. *Liss*, 137 Fed. (2) 995, 1002 (C.C.A. 2).

ARGUMENT.

Summary of Point One.

Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district.

This indictment does not comply with rules of pleading which require facts and not unsupported legal conclusions.

The language of the statute alone here is not sufficient.

The indictment, on its face, shows that the conspiracy cannot be prosecuted because of the Statute of Limitations.

The allegation that something was continuous is a mere legal conclusion and should be rejected, there being no facts or description given to indicate any such conspiracy.

Considering the indictment with the evidence, it cannot be said that a continuing conspiracy was proved. The question was taken from the jury in the charge of the court.

Considering the indictment with the evidence, it cannot be said that the Statute of Limitations did not run. This question was also taken from the jury.

Matters known to the grand jury were alleged to be unknown.

Considering the indictment with the evidence, it is apparent that the prosecutor deceived the defendants as

to the charge, gave them no accurate information and the prosecutor anticipated his own desire for an unlimited range in his proof.

Point One.

There was a fatal variance between the indictment and the proof as to venue.

It now appears, from the entire record, that the positive direct allegation of the indictment, that the conspiracy was formed in New York is not only false but it was known to be false by the prosecutor and the grand jury.

The Circuit Court of appeals dismissed this point as trivial. That court did not even see fit to state our point. Your Honors will not find the word venue in the opinion.

The Circuit Court of Appeals said (R. 4195):

> "We do not find it necessary to discuss the several alleged variances between the indictment and the proof, neither cumulatively, nor in detail, could they have misled the defense; the substance of the charge and the proof were in entire accord."

Your Honors must know that our point cannot properly be dismissed in such manner. Whether or not the defense was misled is only a small part of our point. Those who were transported for trial in 1812 knew they were to be tried in England and were not misled as to the sort of trial in store for them. They fought a war because they knew of the unfair advantage taken by the crown. The framers of our constitution did not contemplate that transportation for trial could be accomplished here from coast to coast.

Your Honors said in *United States* v. *Johnson*, ... U. S. ...., 89 Law Ed. 196:

> "Aware of the unfairness and hardship to which

trial in an environment alien to the accused exposes him, the framers wrote into the constitution that 'the Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed. * * *' " Article 3, Sec. 2, Cl. 3.

"As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' Sixth Amendment.

"Questions of venue in Criminal cases, therefore, are not merely matters of formal legal procedure."

These defendants, except Rosselli, who was removed from California, were removed from their homes in the Chicago area, Illinois. The indictment alleges, in no unmistakable terms, that the conspiracy was formed within the jurisdiction of the court below.[1] No effort was made to prove this allegation. If we assume, from all of the evidence, that the formation of the conspiracy was proved at all, it was entered into in Illinois. No other claim was made by the prosecutor.[2]

The prosecutor, in referring to a conversation in Illinois, said (R. 3638, Vol. IV, fol. 10, 914):

Mr. Kostelanetz: "That is when the conspiracy with these defendants, I submit, started."

Your Honors will perceive, from the evidence, that in the case at bar, the formation of plans and policies which

[1] In considering this variance as to venue, we request your Honors to assume that the indictment is good as a pleading. The Circuit Court treated our complaint as if we merely attacked the indictment. The Circuit Court said our position is curious in the face of Sec. 556 of Title 18 U. S. C. (R. 4195)

We have copied the indictment in full in our appendices (therein p. 7).

[2] We refer your Honors to the closing argument of the prosecutor (R. 3639, Vol. IV, fol. 10,915) where he referred to the origin of the alleged conspiracy in Illinois. Mr. Kostelanetz said:

"That is the beginning of the march of these men with the many names."

would include, of course, the formation of the alleged conspiracy, is foreign to the New York judicial district. No defendant had his residence in the place of trial. None was found in New York. The witnesses were not found in New York. Most of them were transported also.

Your Honors know, of course, that if this indictment had alleged that the conspiracy had been formed in Illinois without any further allegation, the courts of the home district would never have ordered the removal of these defendants, nor would any waiver on removal have been accepted. The defendants consented to removal in order that they might meet the charge in the indictment, *i. e.*, that they conspired in New York. The policy of the law, and fairness, does not admit of the removal of a defendant on one charge, to be eventually convicted of another. We submit that this defect alone is vital and fatal to this conviction.[4]

In *United States* v. *New York Great Atlantic and Pacific Tea Company*, 137 F. 2d 459 (Fifth Circuit), the trial court sustained a demurrer to the indictment. The Circuit Court reversed the trial court after a discussion of the point made below that the indictment did not allege facts showing that the venue jurisdiction was properly laid. It must be clear that the Circuit Court in the *A. and P. case* correctly assumed that if no allegation of local venue was made, the indictment could not have been sustained. The Circuit Court of Appeals in the case at bar necessarily disregarded and conflicted with all that was said on the point in the *A. & P.*

[4] Your Honors will notice that the trial court refused to submit the question of venue to the jury. Nos. 70 and 71. (R. 3773, Vol. IV, fol. 11,318) (Price v. U. S., 68 F. 2d 133; Summers v. U. S., 11 F. 2d 583.) We call attention to these refused instructions to show how desperately counsel strove for some consideration in the trial court. As we have said in our petition, the trial judge did not even request the government to advance a theory or offer an excuse for this high handed method of selecting the tribunal. This point was also urged upon the court in a motion for a directed verdict. (R. 2630, Vol. III, fol. 7890)

case. No mention of the *A. & P. case* is made in the opinion here.

In *De Mayo* v. *United States*, 32 F. 2nd (C.C.A. 8) 472, certain overt acts were committed by government agents. The agents were incompetent under the facts to become conspirators. It was held that their acts could not furnish proof of venue in the district where the indictment was found. In the case at bar, none of the defendants performed any act in New York. If they ever acted in New York, as far as this case is concerned, they were in New York by virtue of the agency which the alleged conspiracy was supposed to create in Bioff, Browne and Circella, all labor officials. Cases in circuits other than the second do not regard the matter of venue in the indictment and in the proof as trivial. We refer to *the Mayo case* because the court there looked into the proof after the pleader had made what must have appeared to have been sufficient allegations of overt acts to create venue. The charge was good if it had been brought in another district.

As was said in *United States* v. *Smith*, 173 F. 227, 232 (D. C. Ind.):

> "If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant states to the capital of the nation, there to be tried, then as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial."

The *Smith case* arose on an application for removal of a newspaper editor for trial in Washington. The judge looked into the evidence to determine how the government expected to establish venue. It never occurred to the prosecutor that he could have alleged that the libel was printed

in Washington and then rely upon the Washington court to regard the variance as trivial.

To evade this point is to besmirch the public reputation of judicial proceedings. Everyone who knows anything at all about the case at bar knows that the defendants were transported for trial. If such action is legal and not in violation of the constitution, it should have been the duty of the trial court and the Circuit Court to explain some theory or basis upon which this could be done within the law. If it was illegal, it became the duty of the lower courts to say so. (See 137 F. (2) 1002) Any well informed layman knows that the point is not trivial.

We venture to say that the removal of a large number of persons for trial in Washington recently in the sedition cases, (*United States* v. *McWilliams*, 54 Fed. Supp. 791) did the public reputation of judicial proceeding and the country more harm than enemy propaganda.

We here present a case where no excuse, good or bad, has been offered. The government arbitrarily selected the place of trial by a resort to falsehood. The supervisory power of this court is sorely needed.

In *United States* v. *Safeway Stores*, 51 Fed. Supp. 448, the trial court sustained a demurrer to indictments under the Sherman Act. This decision was reversed in *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824, (C.C.A. 10). The Circuit Court divided and the majority differed with the trial court on the sufficiency of the indictment. The authorities are collected and all opinions furnish an able discussion on the subject of venue allegations in conspiracy. Everyone connected with the case, including the prosecutors, assumed that in a situation where the conspiracy was formed outside of the jurisdiction of the

court, it was necessary to include in the indictment some facts upon which local venue could be derived. The prosecutors there did not presume to make a false allegation that the conspiracy was formed in Dallas. Such an allegation would have defeated the demurrer, but it would only have borrowed trouble. The prosecutors must have known that a variance would be fatal.

In the case at bar we have copied the indictment (R. 4, Vol. I) into an appendix (therein p. 7) and wish to direct attention to its insufficiency.

Permit us to start with a landmark decision interpreting the constitution, *i. e., United States* v. *Cruikshank*, 92 U. S. 542. It is our contention that this attempt in the case at bar to charge a criminal offense is wholly lacking in the clarity and particularity requisite to inform your petitioners of the nature and cause of the accusation as required by the Fifth and Sixth Amendments. (*Fontana* v. *United States*, 262 Fed. 283; *Nash* v. *United States*, 229 U. S. 373; *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 360; *Sugar Institute* v. *United States*, 297 U. S. 553; *United States* v. *Colgate and Company*, 253 Fed. 522, affirmed 250 U. S. 300; *Standard Oil Company* v. *United States*, 221 U. S. 1; *United States* v. *Carll*, 105 U. S. 611; *White* v. *United States*, 67 Fed. (2) 71 (C.C.A. 10); *Asgill* v. *United States*, 60 Fed. (2) 780 (C.C.A. 4).

No overt act is laid. This would not be a valid objection (*Nash* v. *United States*, 229 U. S. 373), except that here we don't even have any acts alleged by way of description. Overt acts should have been alleged to fix venue.

Your Honors will note that a bill of particulars was refused (R. 37, Vol. I).

We submit that the Act in this case is like the Sherman Act in that it is couched in general language and fails

to enter into details. An indictment in the language of the Act, as here, is not sufficient. (*United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584; *Moore* v. *United States*, 160 U. S. 268; *Manley* v. *Georgia*, 279 U. S. 1.)

As suggested in *United States* v. *Armour & Company*, 137 Fed. (2) 269 (C.C.A. 10), we shall examine this indictment as a whole, for the purpose here and now to show that it was error to deny particularization. The Circuit Court regarded our points as trivial and said that it was curious that we should complain at all, in view of Section 556, Title 18 U.S.C. Of course, your Honors know that constitutional provisions cannot be qualified or amended by statute or decisions. (*Asgill* v. *United States*, 60 Fed. (2) 780.) In circuits other than the second, it has been held that Congress did not intend to change the law at all, but merely enacted into statute the rule as to harmless error, directing that formal defects be disregarded. (*Little* v. *United States*, 73 Fed. (2) 861, 866 (C.C.A. 10) where authorities are collected.) (See dissent in 137 F. (2) 995 (C.C.A. 2).)

After the allegation as to time, the indictment tells of the place (and this is the only allegation as to place, and this is all to be found in the indictment on the subject):

> "In the Southern District of New York and within the jurisdiction of this court."

Now as to what they did. After naming the defendants (plus unknowns), it is alleged that they

> "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly

> conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations,"

including (naming companies, plus unknowns)

> "all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said valuable considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear."

The union connections of the labor people are described and it is alleged that the victims were in interstate commerce.

That it is a part of the conspiracy that the defendants would control the union.

That they as a part of the conspiracy

> "would obtain and attempt to obtain, by the use of and attempt to use and threat to use force, violence and coercion, the payments of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, and would obtain the property of the aforesaid victims, with the consent of the aforesaid victims, induced by wrongful use of force and fear, that is to say, by demanding that said victims pay over to said defendants and said confederates the aforesaid sums of money and other valuable considerations for protection, viz., to prevent and dissuade said defendants and said confederates from restraining, impending and obstructing the production, interstate distribution and exhibition of motion pictures of the aforesaid victims throughout the United

States and otherwise injuring and destroying and attempting to injure and destroy the business of said victims."

That they would extort money for their own use against the Act, etc.

Permit us to strip the indictment down further in order to expose the conclusions. The indictment charges that your petitioners combined

"in connection with and in relation to acts."

What acts? To use

"force, violence and coercion."

What force? What violence? How did they agree to coerce? It is said that they agreed to get the money

"induced by wrongful use of force and fear."

We ask how induced? What force? What fear?

These conclusions are repeated again where it is alleged that it

"was a part of said conspiracy"

meaning, of course, that the pleader stood on his first conclusions as to the conspiracy.

They agreed to demand that the victims pay the money for protection. "Protection" is another conclusion. The protection was, viz., "to prevent and dissuade" (which, of course, are not the same and one is inconsistent with the other) the defendants from restraining commerce and otherwise destroying and injuring the business of the victims.

There is nothing about restraint of commerce in the Act. We ask again how did your petitioners agree as to what they were going to do about commerce here, how were they to "otherwise" injure and destroy? Is this not a blanket charge?

Your Honors will not find the word "strike" in the indictment. It says the defendants "as a part of the conspiracy" would dominate the union, but this allegation is not connected up in any way. Your petitioners were left to guess what they were to prepare to meet.

Now, after your Honors perceive the poverty of the indictment, permit us to examine the time allegation.

The only time alleged is:

> "heretofore, to wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the filing of this indictment (March 18, 1943)."

The gist of the offense is the conspiracy. The crime in this case was committed on or about June 18, 1934. Under Section 582 Title 18 U.S.C. this prosecution must have been brought within three years. We are aware of cases like *United States* v. *Kissell*, 218 U. S. 601, holding that conspiracies may be continuous, but we submit that there must be some facts pleaded or a description of the conspiracy to show that it was the sort of partnership in crime that was intended to continue like a business. Here all we have is the conclusion of the pleader that something or other was "continuously thereafter."

This Act is not like the Sherman Act in the following respect—the Racket Act prohibits "acts" and conspiracies to "act". The indictment says that your petitioners combined to "act".

If the nature of the "acts" were such that they could be expected to continue, it might be possible to describe a continuous conspiracy. From the four corners of the indictment, it does not appear why the defendants should want to conspire and conspire continuously without getting the money (only one sum is indicated), and when

they did get the money, no reason appears as to why they should continue to conspire.

Suppose we look at the evidence to see if a continuing conspiracy was proved. The government relied upon circumstantial evidence so we must look to see what was done to learn what the agreement was. Giving the government every reasonable inference, here is what happened to the victims named. Bioff said, in effect, now that you see what we can do, we want so much a year. The victims got the money and paid it for the first year. Everyone knew that if Bioff should die or lose control, that he wouldn't come around next year. So it all may have been an agreement to stay in business as long as possible, but no one could say for certain that ten years ago the conspirators agreed to a ten year plan. They must have known of the uncertainties and the necessity of renewing the pressure, if possible, and getting the money. The evidence could reasonably be construed not to show a continuing conspiracy, but the jury was told that this necessarily was one. (R. 3731, Vol. IV, Appendix p. 61)

Our discussion of the facts at this point may suggest some of the circumstances the pleader might have put in the indictment from which he concluded that this was all continuous.

In *Nick* v. *United States*, 122 Fed. (2) 660, the pleader not only included facts from which his conclusions were drawn, but he negatived the exception in the indictment. We submit that the exception is so interwoven with a definition of the offense that it should have been referred to in the indictment in the case at bar. (See note 153, A.L.R. 1218)

Now as to venue we shall again look to the evidence. A motion to quash could properly be met by the positive allegation that the conspiracy was formed in New York.

As was said by Judge Eicher in *United States* v. *McWilliams*, 54 Fed. Supp. 791, 794:

> "Standing as we do at the threshold, the allegations of the indictment are controlling and the court is without discretion."

The trial judge in the case at bar of course, did not continue to stand at the threshold, and the Circuit Court was never in that position. Relief was denied below, after the courts were made aware of the true situation and the falsity of the venue allegation.

In order to comply with the constitutional requirements, the place of the offense must be charged with particularity. (Constitution Art. 3, sec. 2, Cl. 3 and the Sixth Amendment; *Skelley* v. *United States*, 37 Fed. (2) 503 (C.C.A. 10.))

Permit us to assume that venue can be laid in a district wherein the conspiracy is made effective by overt acts, although formed elsewhere, and that specification in an indictment of such overt acts is sufficient for venue purposes. (*United States* v. *Trenton Potteries Company*, 273 U. S. 392, 402; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 250.) This is based upon the fiction that overt acts in furtherance of a conspiracy constitute a renewal or reformation of the conspiracy in the district of trial. The government, in the case at bar, should not be permitted to rely upon this fiction when they have pleaded no overt acts. If the evidence will bear the conclusion that overt acts in furtherance of the conspiracy were in fact committed in New York, that will not save the situation. In the *Socony Oil case* your Honors divided over the question as to whether the overt acts relied upon for venue were sufficiently pleaded, and if in fact, they were overt acts in furtherance of the conspiracy. Are your Honors going to allow the prosecutor to not plead

the venue facts at all where the conspiracy was formed elsewhere? In the case at bar, the prosecutor was not required to disclose in advance what acts in New York he intended to rely upon for venue. All he was required to do was to dump the evidence in and then ask us to wonder what he did finally rely upon for venue. When we inform your Honors that the prosecutor claimed at the trial that the conspiracy was formed in Illinois and that he never made any other claim and further that the government can not base any other claim upon the record now are your Honors going to set up a search of the record to determine if there is any proof of the venue allegation? None is to be found. The Circuit Court said there was a variance but that it is unimportant.

As we have said, the trial court never required the prosecutor to state his position or point out the facts upon which he relied upon for venue. The Circuit Court refused to state our point.

In *United States* v. *Safeway Stores*, 51 Fed. Supp. 448, the trial court held that allegations (set out) to the effect that the conspiracy was carried out in part in the jurisdiction of the court were inadequate. "Summed up they are nothing more than conclusions" (p. 456). Judge Hopkins said (p. 457):

> "—it would have been a simple matter to make a specific charge with reasonable particularity of time, place and circumstances. An indictment in that form would have properly pleaded an overt act, and the defendants would thereby have been given knowledge in advance of the trial."

Judge Hopkins displayed clear knowledge of the law as declared by this Court that ordinarily an allegation as to overt acts is unnecessary in Sherman Act cases. But it should be obvious as it was to Judge Hopkins that such allegations are necessary where

the conspiracy was formed out of the trial district. The majority in the Circuit Court, *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824 (C.C.A. 10), held the indictments sufficient. From the dissenting opinions, it appears that the judges divided over the sufficiency of the venue allegation. Could it be possible that any court would have allowed the government to evade all of the known rules of pleading and the constitutional rights of the defendants by merely alleging the formation of the conspiracy in Dallas, and then sustaining a conviction on evidence that it was formed elsewhere and carried out in part in Dallas? The answer, of course, must be no. Could the government have satisfied your Honors in the *Socony Oil case* by a false allegation that the conspiracy was formed in Wisconsin? There could have been no division here in answer to that question.

As was said in *White* v. *United States*, 67 Fed. (2) 71, 79 (C.C.A. 10):

> "In dealing with laws which are intended equally for the protection of the innocent as well as the punishment of the guilty, too much latitude should not be indulged solely for the purpose of arriving at a desired result in an individual case. The looseness in criminal pleading brought to light in this case should not receive encouragement through judicial sanction."

Not only is the indictment stated in legal conclusions and in general and indefinite terms, but many matters are laid under a *videlicit* and stated to be unknown. It was developed at the trial that matters alleged to be unknown were in fact known to the grand jury.

Point One A.

It appeared in the proof that Barger who is referred to in the indictment as unknown was actually known to the grand jury, so there was also a fatal variance in this respect.

The fact that Barger was before the grand jury and known to that body appears from the record (R. 2110, AE 164). Judge William H. Taft reviewed the law upon the subject in *United States* v. *Riley*, 74 Fed. 210, from which we quote (212):

> "If it appear in proof, however, that the persons referred to as unknown were actually known to the grand jury, then there is a fatal variance. *Guthrie* v. *State*, 16 Nev. 667, 670, 21 N. W. 455; *Com.* v. *Gallagher*, 126 Mass. 54; *Com.* v. *Hill*, 11 Cush. 137; *Rex* v. *Bush*, *Russ. & R.* 372; Whart. Cr. Pl. & Prac. sec. 113."

In directing a verdict Judge Taft said (213):

> "In my view of the law, it was therefore the duty of the grand jury to have included in the indictment the names of those who were known, and, this not having been done, the proof here does not sustain the indictment as it is charged. I must, therefore, direct you to return a verdict for the defendant. You do this upon the responsibility of the court."

Point One B.

It appeared from the proof that Rio was known as a co-conspirator to the grand jury. Rio is referred to, if at all, as unknown. Here too there is a fatal variance.

It may be said that the government built its case largely on conversations with Rio as testified to by Bioff which fact was known to the grand jury. We submit that the name of Rio in the indictment was necessary to identify

the crime charged. As was said in *United States* v. *Rhodes*, 212 Fed. 513, allegations that material matters are unknown are permissible from necessity only, when the grand jury does not have and cannot obtain a knowledge of the facts. Even the authorities holding that no error was committed. (*Jones* v. *United States*, 11 F. 2d 98; *United States* v. *Heitler*, 274 Fed. 401) suggest that such a case as this might arise in which the error is fatal. In the case at bar the general nature of the indictment, the trial held a long ways from home, the denial of a bill of particulars, all support our claim that there was a deliberate and successful effort on the part of the government to mislead and deceive the defendants. In some of the authorities which appear against our proposition the conspiracy was fully described and overt acts were pleaded. In *Fox* v. *United States*, 45 F. 2d 364, it was noted that the defendants might have obtained a bill of particulars. In *Durland* v. *U. S.*, 161 U. S. 306, the absence of a motion for a bill of particulars was also noticed.

Your petitioners were required to endeavor to prepare to meet the testimony of Bioff to be given by this accomplice witness a thousand miles from the home of your petitioners. It will be seen that Bioff testified to conversations between him and Rio who was dead. The defense should have been given an opportunity to check in advance of trial on the movements of Rio. Roach appeared for the government (R. 2363, Vol. III; R. 2951, Vol. IV) and said that he delivered a package of money at the request of Kaufman to Nitto in Chicago. Nitto, named as a defendant, was also deceased at the time of the trial. The defense was able to prove that Nitto was in Hot Springs, Arkansas, at the time Roach said he met him in Chicago. Need we argue the value of the constitu-

tional safeguards requiring the prosecution to inform the defendant in the indictment, what, where, when and how,—to furnish such a description of the charge against him as will enable him to make his defense.

Please see our appendix (pp. 97, 98) where we have reprinted the opinion of the Circuit Court and have pointed out all that was said there on the subjects here under discussion.

Summary of Point Two.

The Act provides that it should not apply to organized labor. This being a circumstantial evidence case, it was necessary to prove what was done in order to prove that which was agreed upon. All the contacts between the victims and the conspirators were through labor representatives. Whether the exception applied in the case at bar became a mixed question of law and fact. The trial judge erred by instructing the jury that labor was not involved and by refusing to even refer to the exception. The case was tried as if the exception had never been incorporated in the Act. This grievous error met the approval of the Circuit Court in opposition to an applicable decision of this court.

Point Two.

It was error to take from the jury the question as to whether the Act applied by reason of its exceptions.

In *United States* v. *Local 807*, 315 U. S. 521, it appears from the opinion of this Court that the trial court gave two instructions set out in the opinion of this Court. These instructions embodied the erroneous theory of the govern-

ment in that case. In the *Teamsters case*, the government endeavored to make a jury question out of what the prosecutor regarded as a proper construction of the statute as applied to the facts in that case. The government attorneys there failed to properly construe the Act and consequently the court erred in adopting the theory of the prosecutor. Reversal followed.

In the case at bar, the government avoided all complications by entirely ignoring the exception in the statute. The prosecutor succeeded in prevailing upon the court to decide against any application of the exceptions in the statute, as a matter of law. The government made no effort to embody any theory concerning the exceptions in any instruction. The charge as a whole took the question from the jury.[5] In the matter of admitting and excluding evidence, upon the charge to the jury, and at every step in the trial, the court decided, as a matter of law, that the exceptions in the statute did not apply and that the jury should not hear of the exception.

It is our contention that the question, as to whether the exceptions apply, is a mixed one of law and fact. We contend that this question should have been submitted to the jury under proper instructions. We quote from the opinion by Judge Learned Hand in the *Teamsters case* (118 F. 2d 684, 689, affirmed 315 U. S. 521):

> "We shall assume arguendo that, had the issue been properly presented to the jury, there was evidence to sustain a verdict against these men.

[5] We have copied the entire charge of the court in the case at bar as an appendix. Your Honors will find that we have supplied bold face type in order to point out the portions of the charge claimed to be erroneous. Of course, the absence of instructions will have to be determined from the charge as a whole. We have copied also some of the refused instructions with appropriate references to the record in order to show that every effort was made at the trial to secure a correct decision. We have interspersed our notes in italics in order to show the many prejudicial errors. (Appendix pp. 37 to 84)

> "That assumption will not change the result because the issue was not properly presented. * * *
>
> "A verdict should not stand when the jury has been so far misdirected upon the very kernel of the case. * * * There was really nothing left for them to decide if they concluded that the payments had been extorted by threats."[6]

In the case at bar, we submit that the jury was so far misdirected upon the very kernel of the case, as to leave nothing for them to decide, if they concluded that payments were made because of the fear had by the employers of the power exercised by the union. In the instant case, there could be no question but what payments were made because of fear of the power of the union. This fact could not be disputed. Nothing was left by the court for the jury to decide in our case.

In the *Teamsters case* Mr. Chief Justice Stone dissented but we notice that the Chief Justice took care to point out that the instructions covered his view of the meaning of the exception as applied to the facts in that case (315 U. S. 521, 539).

Our point in the case at bar is good regardless of whether the majority opinion of this Court or the dissent be consulted in the *Teamsters case*. The exception has some meaning and it was involved in our case whether your petitioners are guilty or innocent, and the trial judge had no right to take it from the jury any more than he had a right to direct a verdict of guilty.

We quote from the charge of the court as given in the trial of this case (R. 3735, Vol. IV, fol. 11, 203; Appendix p. 66):

The Court: "We do not have to decide whether

[6] Although Judge Hand wrote both opinions, no reference is made in the case at bar to the *Teamsters case*.

> the condition of the laboring man was benefited by these disputes or what transpired."

The defendants endeavored to touch upon the issue by an instruction (16) which was refused (R. 3780, Vol. IV, fol. 11, 338; Appendix p. 77).

We submit that the prosecutor purposely ignored the exception in the statute as appears from the entire record, including his argument (R. 3658, 3711, Vol. IV; Appendix pp. 27, 35).

Your Honors will observe from the record, that every cent of money was obtained by an official of a labor union, and all of the threats were based upon the power exercised by labor officials.[6a] Your Honors must know that Congress, in deference to labor, did not choose to exercise the full limit of federal jurisdiction. Your Honors can't think for a moment that the leaders of labor would have been satisfied with the exceptions, if the exceptions might properly be ignored, as in the case at bar.

If this conviction is to be sustained, it means that a federal judge has a right to consider the conduct of a labor official and decide as a matter of law, that the federal courts have jurisdiction, and that the exception does not apply, and to decide further that the jury should not hear of the exception.

In the case at bar, the Court indicated clearly that it was important to determine if these union officials paid the money into the union, as appears from the direct examination of Bioff. (R. 201, Vol. I, fol. 602)

The Court, in effect, requested Bioff to pass upon the state of mind of the victims, and their purpose in making payment. All of the facts in the case would warrant the jury in believing that the money was paid to Bioff and

[6a] We purposely disregard Barger for reasons which will appear.

Browne as labor officials. The fact that these officials embezzled the money after they received it should not change the situation.

In the matter of the first $20,000 obtained from Balaban & Katz (R. 119-122, Vol. I), the union officials represented that the money was to be used for a soup kitchen, a charitable enterprise, conducted for the benefit of the union. The employers paid this sum as a matter of expediency. They admitted that they feared that if an increase in wages had been awarded, the employers feared that raises would have been demanded by other unions. If the embezzlement of the money by the officials gives the federal court jurisdiction, then it follows that keeping part of it would taint the transaction. If a soup kitchen can be used as a pretense, so can a trumped up jurisdictional dispute.

If this conviction is to be sustained, the federal courts will be empowered to inquire into the internal affairs of every union where a strike occurs, or is threatened, to see if the officials have betrayed their trust.

Such was not the intention of Congress as appears from the language of Judge Clark in the *Teamsters case*, from which we quote. Speaking of the exception in 420d of the Act, Judge Clark said (118 F. 2d 684, 689, affirmed 315 U. S. 521):

> "It (the exception) may therefore mean in effect that the acts of violence here made a federal crime do not include such acts when occurring in otherwise legitimate activities of bona-fide (*i. e.*, non outlaw) labor organizations. If the word 'otherwise' should be omitted from this statement, if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the act."

If Judge Clark[5a] had applied this reasoning to the case at bar he would have said that when it appears from the evidence that a union official has received money from an employer, the inquiry should end right there. Congress did not intend to supervise the traditional activities of union officials.

The Circuit Court of Appeals, in our case, begged the question as follows (R. 4195, fol. 4196; Appendix p. 95):

> "But if the accused at bar were not concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen; but to feather their own nests, they coerced their victims within the meaning of the section. The judge should have left to the jury nothing more than he did."

The use of the word "if" indicates that other conclusions were open. It must be remembered that those who collected the money were always concerned in wage disputes, and an improvement of the union and its members. The prosecutor conceded this in argument (R. 3671, Vol. IV). We submit that this holding by the Circuit Court renders the proviso meaningless, since it would then say that union activities are excepted only when the court deems the objective to be solely for a union purpose.

Nowhere in this long record has the prosecutor intimated or suggested that the union involved was an outlaw union, or that the officials were not lawfully elected or appointed. The various local unions and the IATSE were regularly and duly affiliated with the American Federation of Labor. Browne was a vice president of the American Federation of Labor. Regardless of the character of Bioff, he had been regularly appointed as an assistant to Browne

[5a] Judge Clark sat with Judge Learned Hand and Judge Swan in both cases *i. e.* the *Teamsters case* and the case at bar. These three judges can not be right in both cases, yet they make no mention of their previous viewpoint.

and acted as a regular union representative. Kaufman was the regular representative of a legitimate union in Newark. Circella had been appointed in a union capacity. Bioff and Browne betrayed their trust, it is true, but we have observed no intention of Congress to police the internal affairs of labor unions.

The evidence of strikes having been admitted, the Court should have taken the precaution to inform the jury that the defendants were not on trial for the damage which might have arisen through the traditional activities of labor unions.

In order to refer your Honors to some of the evidence admitted as to strikes, threatened strikes and the demands made, we submit the following references to the record. (R. 119, 120, 115, 157, 180, 166, 171, 179, 203, 204, all in Vol. I)

> The Witness Bioff: (R. 204): "We were waiting for some good sound legitimate violation by any one of the studios which would give us a good ground to start a war. * * *
>
> "We decided a new approach, since we were not getting any satisfaction from the heads of the Paramount Company here in New York, we are going to try to pressure the heads through pressuring their major circuit in Chicago."

Browne told of the manner in which he employed one Newman to watch things in Hollywood in search of a union violation. (R. 1078, Vol. II)

Here follows, in the record, a description of the manner in which a strike was called in Chicago and a conference was had between the officials of the company and the union officials. Bioff said (R. 209, Vol. I):

> The Witness Bioff: "The accomplishment was that Mr. Otterson asked me to open the theaters on a promise that he would do everything in his power to

> see to it that the IATSE retained its jurisdiction and they would correct the mistake that they made."

This was followed by a meeting in New York of which Browne reported to Bioff as follows (R. 210, Vol. I):

> The Witness Bioff: "The Report was that we were getting back all of our jurisdiction and that we will have a closed shop there too."

By this maneuver, the union acquired six or seven thousand men. (R. 211, Vol. I)

From the description given by Bioff, of the meeting between employers and employees in 1936 the jury had a right to infer and believe that Bioff was speaking in his capacity as a union leader; that when he said to Schenck "we wanted some of that money back", he meant the union and its members and officers. If such version be adopted, we submit, Congress did not intend to have the Act apply. At least, we submit, the defense was entitled to have such a defense theory passed upon by the jury, under proper instructions.

Your Honors said in *United States* v. *Local 807*, 315 U. S. 521, 527:

> "To ascertain the limits of the exception is a difficult undertaking."

Also that (p. 536):

> "The jury's task was difficult."

Your Honors, in *the Teamsters case*, figured three ways in which the facts in that case might be interpreted, and this court proceeded to construe the statute as applied to those facts. In the case at bar, further problems of construction are presented.

Your Honors said further in *the Teamsters case* (p. 530):

> "—no interference with traditional labor union activities was intended."

We again quote from the opinion in *the Teamsters case* by Mr. Justice Byrnes (p. 530):

> "It may be true that professional rackets have sometimes assumed the guise of labor unions, and, as the Circuit Court of Appeals observed, that they may have 'covered their practices by the pretense that the tribute collected was pay for services rendered.' "

We submit that it cannot be said that in the case at bar professional rackets assumed the guise of a labor union, but if the evidence could be so construed, we believe that Judge Byrnes means to imply that notwithstanding this danger, Congress intended not to interfere with traditional labor union activities, lawful and unlawful.

Judge Byrnes said further (p. 531):

> "And it may also be true that labor organizations of good repute and honest purpose can be misdirected and become agencies of blackmail."

Here is the category in which the government places the IATSE, but we submit that Judge Byrnes means to imply that with all of this in mind (p. 531):

> "Nevertheless, Congress plainly attempted to distinguish militant labor activity from the other and to afford it ample protection."

In other words we submit, Congress could not amply protect militant labor activity without giving immunity, as far as the federal government is concerned, to labor unions which might become agencies of blackmail.

Judge Byrnes said further (p. 535):

> "We have expressed our belief that Congress intended to leave unaffected the ordinary activities of labor unions. * * * The test must therefore be whether the particular activity was among or is akin to labor union activities with which Congress must be taken to have been familiar when this measure was

> enacted. * * * *It is not our province either to approve or disapprove such tactics.*" (Italics supplied)

Your Honors will permit us to observe that we do not seek to justify the activities of Bioff and Browne. They may have been within the reach of the federal government, if Congress had not seen fit to accede to labor. We do not contend that the illegal conduct shown by this record need go unpunished. Our point is, that these defendants, including Bioff and Browne, do not come under the Act, by reason of its exceptions. We again quote from Judge Byrnes (p. 536):

> "This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law."

Do your Honors think for a moment that if the evidence in *the Teamsters case* showed that some of the officials kept the money that that would have altered the situation? Suppose, for instance, that in *the Teamsters case* the union officials had collected money and turned a portion of it over to other persons, would that have changed the situation? We say no. The conduct of the officials in such case may have been reprehensible, but it would not be punishable under the Act.

Your Honors will perceive that the trial court was of the erroneous opinion that Congress intended to reach such a situation as presented here, that Congress intended to police the internal affairs of unions. We quote from the record as made on the day of sentence (R. 3842, Vol. IV, fol. 11, 526):

> The Court: "The acts of these defendants constituted a violation of an Act of Congress obviously passed to stop gangster control and activity and injury to property rights, and certainly the imputation of disgraceful conduct in union affairs. These things must not be, and if this Court can do something to prevent future transactions of this kind it would seem to be its duty to do it."

We submit that the trial court read "gangster control" and the "imputation of disgraceful conduct of union affairs" into the Act.

Congress has failed to provide for the misconduct of labor officials if they should allow outsiders to control them and has failed to provide for their misconduct of union affairs in this Act. Whether Congress should or would is another question.

In *United States* v. *McGlone*, 19 Fed. Supp. 285, the District Judge acquitted a labor representative on the evidence of the government. The judge has stated in his opinion that he read the reports of the hearings on the investigation of so-called rackets by Congress. What is set out of this in this opinion confirms our contention that Congress did not have in view the misconduct of labor men.

We have examined the briefs filed in this court on both sides in the matter of the petition of the defendants in the *Nick case* for certiorari. (Certiorari denied, 314 U. S. 687; rehearings denied, 314 U. S. 715, 316 U. S. 710.) We copy the "questions submitted" by counsel for Nick, as re-phrased by the government.

> "Whether action of labor union representatives in obtaining, by coercion, money for their own personal use in consideration for betraying the interests of the union members whom they assume to represent constitutes 'lawfully carrying out the legitimate objects'

of a labor organization within the meaning of the proviso to section 6 of the Anti-Racketeering Act."

Assuming that that is a fair question based upon the record in the *Nick case* it could not apply in the case at bar standing alone. It would not include the fact that the judge in our case refused to permit the jury to pass on this question and would ignore our main question as to whether a judge has a right to answer this question in the negative, and to hold that the jury should not hear of the exception at all.

Summary of Point Three.

The undisputed evidence showed that the acts related to the exhibition of motion pictures. The trial court regarded the exhibition of motion pictures as interstate commerce, as a matter of law, and so instructed the jury. The Circuit Court preferred to follow another circuit opinion in order to approve this error and at the same time rejected applicable decisions of this Court.

Point Three.

It was error to take from the jury the question as to whether the conspiracy was in connection with and in relation to acts affecting interstate commerce.

The Act[7] is entirely predicated upon the power of Congress to regulate and control Interstate Commerce. Here is the title:

> "*Interference with Trade and Commerce by Violence, Threats, etc.; Penalties.*"

[7] We have copied the Act in full as an appendix here (p. 3).

We quote from the Act:

> (420a) "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—"

Section 420b defines "trade or commerce," which means interstate commerce.

The indictment follows the language of the statute and charges (R. 4, Vol. I), that the conspiracy was:

> "—in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce,—"

This allegation is at the heart of the case. The fact that this portion of the law which gave the federal court jurisdiction was in issue was called to the attention of the jury in the summation on behalf of the defense. (R. 3378, 3398, 3503, 3504, Vol. IV, fol. 10,133, 10,193, 10,508, 10,510) The pleas of not guilty put in issue every allegation of the indictment and placed upon the government the burden of proving every essential element of the offense charged. (*Prettyman* v. *United States,* 180 Fed. 30.)

The formal proof as to the production of films in Los Angeles and their distribution in interstate commerce through various exchanges, was furnished by Nicholas Schenck. (R. 1327, Vol. II, fol. 3981) The moving picture firms have been in litigation, as appears from the various court reports. (*Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Fox Film Corporation* v. *Federal Trade Commission,* 296 F. 353; *Paramount Famous Lasky* v. *United States,* 282 U. S. 30; *Youngclaus* v. *Omaha Film Board of Trade* (D.C.), 60 Fed. (2) 538; *Mutual Film Corp.* v. *Industrial Comm. of Ohio,* 236 U. S. 230; *Boynton* v. *Fox West Coast*

Theaters Corp., 60 Fed. (2) 851; *Metro-Goldwyn-Mayer Dist. Corp.* v. *Bijou Theater Co.*,59 Fed. (2) 70, all cited in *United States* v. *Interstate Circuit*, 20 Fed. Supp. 868) It may be said to be common knowledge that the producers and distributors are engaged in interstate commerce. (*Binderup case*) The error of the court, which was pointed out, in the case at bar, appears all through the case, and particularly in the charge. The trial court failed to attach any significance to the fact that the business carried on by the moving picture industry is divided into three parts, *i. e.*, production, distribution and *exhibition*. We contend that it is clear, and firmly established, that the *exhibition* of moving pictures is not interstate commerce. (*Mutual Film Corp.* v. *Ohio Indus'l Comm.*, 236 U. S. 230; *Fox Film Company* v. *Trumbull*, 7 F. 2d 715; three judge court, D. C. Conn.) It is true, of course, that interference with the *exhibition* of pictures might, in fact, stop or diminish the flow of films in interstate commerce, but such interference would be incidental. (*Schecter Poultry Corporation* v. *United States*, 295 U. S. 495)

The trial court made the mistake of solving the issue as a matter of law. The trial court held that, in view of the fact that the moving picture industry was engaged in interstate commerce, any extortion from any part of the industry was made criminal by the Anti-Racketeering Act. We submit that the trial court should have recognized the fact that films are not *moving or about to move* in interstate commerce during their *exhibition*. If the position taken by the trial court were sound, a person who obtained money on a threat that he might throw a brick through the window of an A. & P. store would come under the federal jurisdiction, as created by the Act, merely because the A. & P. Company happens, in some of its branches, to be engaged in interstate commerce.

The court explicitly took the issue from the jury as follows (R. 3722, Vol. IV, fol. 11, 166; Appendix p. 50). We quote from the charge:

> The Court: "It does not seem to me that there is any contradiction * * * that whatever was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce. Nothing was said about it in the summation, as I remember, and I presume there is no question about it remaining in the case under the undisputed evidence."[8b]

The Court was in error in stating that nothing was said about it (interstate commerce) in the summations. (R. 3378, 3398, 3503, 3504) It would be an innovation, and error, to require counsel to either argue a legal point to the jury or be foreclosed. The trial court should have known that this issue was in fact contested by reason of the requests to charge, submitted to the court by the defense, before the trial court delivered its charge.

It is true, of course, as the trial court told the jury in the above instruction, that the evidence upon this subject is undisputed. Our point arises from the undisputed evidence, which fact makes our position unassailable.[8a]

In the case at bar the Circuit Court of Appeals said (R. 4194):

> "Nothing could more completely illustrate the unity of the whole industry; all its parts were like those of a single elastic member in which an impact upon one part is instantly (fol. 4196) transmitted everywhere. Moreover, not only would the producers feel the check upon the interstate movements of their films when the exhibitors were tied up; but, since many of the exhibitors did business on a small margin, and must have a

[8b] Please also see our appendix here where we have indicated numerous errors in the charge, including a repeated assumption that interstate commerce was involved in the exhibition of films.

[8a] Petition for Rehearing. (R. 4211)

> constant supply of films to keep going at all, a very short cessation of that supply at the sources might destroy them, and end them forever as outlets. If these were the facts, the business was interstate as matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue."

The Circuit Court is mistaken in saying that the trial court found it unnecessary to say anything on the issue. The trial court said that the point should be decided in favor of the government and thereby invaded the province of the jury.

We submit that facts are in dispute when the conclusions to be drawn are in conflict. At any rate, your Honors will perceive that the Circuit Court of Appeals has decided the issue as one of law. Such decision gives us a right to be heard here because the question has been decided in conflict with the decisions of this court. *Mutual Film Corp.* v. *Industrial Comm. of Ohio*, 236 U. S. 230; *Schecter Poultry Co.* v. *United States*, 295 U. S. 495.

In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, your Honors held that a proposition (seaworthiness) usually one of fact, was held to be a matter of law below and therefore reviewable here.

The same error as that committed below here, *i. e.*, holding that the presence of interstate commerce is a question of law, was committed by the Circuit Court of Appeals for the eighth circuit in *Nick* v. *United States*, 122 Fed. (2) 660, 673, cited in the case at bar.[9]

We quote from the *Nick case:*

> "It is not for the jury to determine what is or what

[9] It appears that the Circuit Court preferred to follow the Nick case, although it conflicts in this and in other points with the decisions of this court.

> is not interstate commerce—that is a question of law."

Your Honors will recognize the error of the Nick case on this point from the above quotation.

The defense endeavored, in vain, to prevail upon the court to submit this important issue to the jury, as appears from refused instruction No. 52, No. 53A, 53B, 20. (R. 3766, Vol. IV, fol. 11, 298; R. 3767, 3781, Vol. IV, fol. 11, 299, 11, 341; Appendix pp. 73, 74, 78) A defendant is entitled to instructions upon any theory of defense based upon the evidence[8] (*Meadows* v. *United States*, 82 F. (2) 881). An instruction which singles out and declares effect of certain facts without consideration of other modifying facts constitutes prejudicial error (*Meadows* v. *United States*, 82 F. (2) 881).

The case of *McAdams* v. *United States*, 74 F. 2d 37 (C.C.A. 8), illustrates our position. The defendant, a second hand automobile dealer, had been convicted of having received and sold cars moving in interstate commerce. The defendant requested a proper instruction which was refused. The charge of the Court took the issue from the jury and the reviewing court said (39):

> "We think it is clear that the refusal of the court below to instruct the jury that the burden was upon the government to prove that the cars in question were in interstate commerce when received and sold by the defendant was an error which entitled the defendant to a new trial."

[8] Although the law is fundamental, we refer to People v. Scalisi, 324 Ill. 131, 154 N. E. 715, merely by way of illustration. The Illinois Supreme Court held that a defendant is entitled to instructions upon any reasonable theory arising from the evidence even where the offered instruction contradicts the testimony of the defendant. Although the principle is recognized without discussion in many cases we don't find a federal case parallel to the Scalisi case. In the case at bar the defendants did not testify so the Scalisi case is not cited to fit our facts in that regard. It is a good case to demonstrate the point.

As to the error of the court in refusing a proper question of law not covered by the charge as given, see *Hersh* v. *United States,* 68 F. 2d 799, 807, and *Malaga* v. *United States,* 57 F. 2d 822, 825.

In *the Teamsters case,* the defendants were convicted not only under the Anti-Racketeering Act but under the Sherman Act. The Circuit Court of Appeals reversed that conviction insofar as the Sherman Act is concerned, under the authority of *Apex Hosiery Company* v. *Leader,* 310 U. S. 469. The prosecutor, in the case at bar, profited by that experience to the extent that he did not include the Sherman Act in the indictment here. Still there is much of value to be found in the *Apex case* from which we quote (p. 489):

> "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the (Sherman) Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce."

After reviewing the cases, this court said in the *Apex case* (p. 513):

> "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."

We submit that if the trial judge is correct in the case at bar, every local strike in the moving picture industry would be brought within the jurisdiction of the federal courts.

We quote[10] from 15 *Corpus Juris Secundum,* COMMERCE p. 281, section 18, citing *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. (2) 742 (C.C.A. 9):

> "The fact that a business having aspects of both interstate and intra-state operations is conducted by a single corporation does not make the entire business either interstate commerce or intra-state commerce, but its character is determined by the particular transactions involved."

We submit that in the case at bar the prosecutor and the trial court both lost sight of the fact that the *exhibition* of pictures is a local business.

In *Pennsylvania Company* v. *Donat,* 239 U. S. 50, in an action based an the Employers' Liability Act your Honors held that the trial court properly submitted to the jury for its determination whether, on the facts shown in regard to movement of cars coming from without the State, the plaintiff was or was not engaged in interstate commerce. This action of the trial court had been approved by the Circuit Court of Appeals. The only ground upon which the railroad asserted error in this Court was that the trial court erred in refusing to charge that the plaintiff was not engaged in interstate commerce. The trial court did not err. This court held that the point was so frivolous as to not need argument and affirmed the judgment on motion. In the case at bar, the trial court did exactly what the trial court refused to do on behalf of the railroad in the *Donat case.*

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[10] We feel that we should apologize for belaboring a point on which your Honors are experts. It seems so clear and simple to us, yet if we are not entirely mistaken, two courts below have failed to understand the merest fundamentals.

As this court said in *Schechter Corp.* v. *United States*, 295 U. S. 495, 546:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. *Minnesota Rate cases*, 230 U. S. 352."

The question of whether the films were moving in interstate commerce became involved in the *Nick case*. When the convicted defendants applied here for certiorari, the government rephrased the "question submitted" and asked:

> "Whether money obtained from motion picture exhibitors under threat of calling a strike which would interrupt the interstate flow of films to these exhibitors is money obtained 'in connection with any act affecting (interstate) trade of commerce' within meaning of section 2 of the Anti-Racketeering Act?"

This question assumed that the films were "in flow" and the facts in the *Nick case* appear to support the theory of the government. Nick and Weston conducted a sound service which burdened the flow of films to and from the exchanges and over state lines. In the case at bar the defendants were deprived of consideration of the fact that the films had come to rest and were mingled with State property. That a strike might incidentally affect the movement of films. If the same question, as above quoted, were offered here by the government, we would suggest that "the flow of films" be not assumed. Also that there be included the fact that the judge employed the literal meaning of the words of the Act as to "acts affecting commerce" and took the question from the jury.

Summary of Point Four.

The courts below applied the literal meaning of the Act to make it apply to the exhibition of motion pictures and in such manner as to make the Act govern every state activity. Congress did not intend any such construction and if Congress did so intend, the Act is unconstitutional. Here too the Circuit Court rejected applicable decisions of this court and gave preference to a decision in another circuit.

Point Four.

Construction given below to scope of Act renders it unconstitutional.

We submit that if the Act is to be construed in the manner adopted by the trial court and the Circuit Court of Appeals, it is unconstitutional and not within the power of Congress. We have already quoted from the opinion (R. 4194) of the Circuit Court where that court compares the movie industry to "a single elastic member."

If such a decision is to stand, and should be followed in New York and elsewhere, every strike is within federal control. This conflicts with the decision of this court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

We conclude, from the charge and from the entire theory of the trial below, that the court and the prosecutor must have abided by the letter of the statute which makes the acts thereby prohibited federal offenses if done—

> * * * "in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in interstate commerce."

The Circuit Court of Appeals, in the case at bar, approved of the action of the trial court without mention of our claim that such a construction renders the Act unconstitutional. In *United States* v. *Gramlich*, 19 F. Supp. 422, 424 (D. C. Ill.), the constitutionality of the Act was attacked on this ground. Counsel for the government asked the court to disregard the broad language of the Act in order to save its constitutionality. The court overruled the demurrer because the indictment averred a *substantial* and *material* interference with interstate commerce. In the case at bar the indictment is as broad as the statute. The indictment assumes that the *exhibition* of motion pictures is interstate commerce.

We do not suppose for a moment that your Honors are going to enforce the literal meaning of the Act. There are limitations upon the power of the federal government. The greatest exertion of power is allowed in the regulation of commerce as such. This court has often said that the Congress has not seen fit to police interstate commerce. (*Apex case*) The police power of the states in the control of crimes of violence is not to be infringed upon by Congress. The power to deal with force and violence is expressly guaranteed to the states, the federal government is expressly prohibited from invading this power. We don't believe Congress intended to exceed its power.

Summary of Point Five.

The trial court allowed the victims to tell what they feared and why they paid the money. This state of mind testimony was given years after the event and included what the victims had heard of the defendants since it was discovered that they were in the picture, and included hearsay evidence as to property damage, bombings, murders which had been caused in the past during strikes, strikes with which the defendants were not even thought to have been connected. The Circuit judge who wrote the opinion thought that this was error but to him it seemed harmless and did not prejudice the defendants. The other two judges thought that there was no error. All three judges ignored an applicable decision to the contrary in this court.

Point Five.

The state of mind of the victims.

This point arose first in the direct examination of the witness Jacocks (R. 960), sole manager in charge of theaters operated by Warner Brothers in New Jersey. The witness was asked why he paid Bioff. Objections were made (R. 960, Vol. II, fol. 2879), and after argument, the court permitted the answer, *i. e.*, that Jacocks was afraid that their theaters would be closed.

This point arose next in the direct examination of Nicholas Schenck (R. 1337, 1355, Vol. II, fol. 4063):

> The Witness Schenck: "The reason I made the two payments is, as I explained before, because we had to pay it or destroy our business." * * *

Upon re-direct examination of Schenck, the prosecutor developed that Schenck had consulted lawyers and could

not obtain a labor injunction because of the Wagner Act. (R. 1466, Vol. II, fol. 4397) The witness was then asked again what he had in his mind when he paid. After an objection was overruled, he told of difficulties in New York in 1935. Schenck said that pictures were run upside down and out of order, the lights had gone out, that they experienced all kinds of trouble with stink bombs and other things. Then there appears the following (R. 1467, Vol. II, fol. 4401):

> The Witness Schenck: A. * * * the whole thing was so alarming to me, and knowing that after all that not only is it money, meaning that it would destroy our business, but it involved the safety of people that go to the theaters. * * * I had in mind the consequences of a strike, the possibilities of the damage that would be done, the possibilities of human life. * * * In one of our theaters, your Honor, we found a bomb under the roof of the theater, that holds about between 3,800 and 4,000 seats. We were never able to find out who put it there."

We submit that it was prejudicial error to permit proof of the state of mind of this witness, and the court erred in refusing (R. 1467, Vol. II, fol. 4400) to strike out the improper evidence as to what Schenck had in his mind when he testified that he was thinking of the safety of the people who go to theaters.

During the direct examination of Albert Warner for the government, the witness answered as to what he had on his mind, he said that he knew that these people

"had a murder or two to their credit,"

that the business, being a cash business, would go bankrupt if the wheels should stop rolling for a matter of days. (R. 1556, 1557, Vol. II, fol. 4671):

> The Witness Albert Warner: "The harm they could do both to the physical property of the company and

> me personally. * * * That was in my mind, and knowing the record of these people, a murder or two to their credit."

After another objection was overruled, specifically pointing out that it was error to permit a witness to tell what was on his mind and to permit him to give a panorama of business conditions and other things, and to express now that that was on his mind, and to relate his fear of strikes (R. 1558) there appears the following during the direct examination of the witness Harry Warner (R. 1660, Vol. II, fol. 4978):

> The Witness Harry Warner: A. "I felt that the man (Bioff) had the power to close up the business and cause you bodily harm, whichever one or maybe both, and those two things combined persuaded me that I had better give it to him."

We quote further from the record, as made during the direct testimony given by the witness Coston (R. 1728, 1799, 1801, Vol. II, fol. 5183):

> A. The only way I could keep the theaters operating, * * * was to pay this man (Bioff), otherwise we would have had strikes.

Here again, we submit, the trial court indicated very clearly that it was of the opinion that a state of mind, or thought, that strikes might be called and that the witness feared such an event, was proper as evidence.

The prosecutor took advantage of this erroneous ruling to call for experiences and hearsay evidence of violence and damage. We submit that the entire proceeding was improper and harmful. All of this improper evidence can be boiled down to the fear had by the employers of the power which might be exercised by a union, if the union should choose to resort to primitive methods. Although now and then the court did strike some of the

matters after they were volunteered it is apparent that the witnesses thought it was proper to tell what they had heard of some of your petitioners since the exposure by Bioff.

We refer your Honors to the record as made upon the re-direct examination of Coston (R. 1799, 1801, Vol. II, fol. 5397):

> The Witness Coston: A. "We had some experience in the years past, especially in 1931, or the strike of the independent theaters, where they were operating with one man and the union would not consent to let them operate with one man and two or three people were killed, some operators, and people withdrawn. * * * Bombs were thrown in the theaters, considerable damage was caused to the theaters, and my own men, in 1935 and 1936, after the death of—* * *"

Here again, under the guise of proving a state of mind, which of itself is improper, the prosecutor prejudiced the defendants with hearsay evidence of murders, bombings and damage, inflicted long before it is claimed that these defendants were involved. The prosecutor made full use of the improper evidence in his appeal to prejudice, in his summation. (R. 3665, 3642, 3643, Vol. IV, fol. 10, 993, 10, 925):

The errors complained of under this head appear also in the direct examination of the witness Keough (R. 1825, Vol. II, fol. 5473) who said that he feared personal harm. We submit that it was improper for the court and the prosecutor to develop from the witness his fear of personal harm, especially in view of the lack of any such charge in the indictment.

The same erroneous rulings appear during the direct examination of the witness Barger (R. 2152, Vol. III, fol. 6455) who said he was afraid of his business. In view of the fact that the Barger deal was entirely foreign to the issues, this error was especially prejudicial.

The error of the court in the case at bar appears from a reading of *United States* v. *Local 807*, 315 U. S. 521, from which we quote (532):

> "If the objective that these defendants sought to attain by the use of force and threats is not the objective to which the exception in Sec. 2 (a) affords immunity, they are guilty and nothing further need be shown concerning the actual motive of the owners in handing over the money. On the other hand, if their objective did enjoy the protection of that exception, they are innocent and their innocence is not affected by the state of mind of the owners."

Thus *the Teamsters case* settled in no unmistakable terms that the state of mind of the victims is immaterial. It is difficult to understand why the law should not have been followed here in the court below, especially when it is remembered that *the Teamsters case* arose in New York. There is nothing which could bring the courts into disrepute quicker than to allow the impression that they decide the law one way in one case and the opposite in another because of the persons involved. One would think that the Circuit Court would have been glad to explain just what prompted them to regard this case differently than they did the *Teamsters case*. We were entitled to a fair discussion which would be expected to include their views in regard to the law of the *Teamsters case*, as applicable here. Or if they believed that the *Teamsters case* did not apply they should have said so.

In the case at bar, the error is further emphasized by the fact that the court took from the jury the question as to whether the exception in the statute applied. The court improperly decided, as a matter of law, that the requisite intent was present and at the same time allowed the jury to hear improper evidence on the issue of intent, *i.e.*, the state of mind of the victims. We submit, that in every case

where employers hand money over, or accede to any demand made by a union labor official, the victim has fear of the power of the union. Congress intended to not interfere with this power as traditionally used, even where primitive methods are employed or threatened. It must be apparent that the trial court here improperly permitted the government to show the motive of the owners in handing over the money.

Even if the court had been correct in its ruling, the court should have recognized that the evidence was admitted for only a limited purpose. The court should have prevented the prosecutor from making use of this immaterial evidence in an appeal to prejudice as appears from his summation. (R. 3642, Vol. IV, fol. 10, 924) *Pierce* v. *United States*, 86 F. 2d 949, 953; *Read* v. *United States*, 42 F. 2d 636, 645:

As was said by Mr. Justice Byrnes in *the Teamsters case*:

> "Under them (the instructions) the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purpose of others and not upon their own aims and objectives."

We trust that after a full consideration of the case at bar, your Honors will say, as was said by Mr. Justice Byrnes (p. 539):

> "Since the instructions denied, and the misleading instructions actually given, go to what is indeed the heart of the case, we hold that the convictions cannot stand," * * *

The defense endeavored to limit the evidence as to violence in general by an instruction which the court refused (R. 3775, Vol. IV, fol. 11,324).

Greater New York Live Poultry C. of C. v. *United States*, 47 F. 2d 156 relied upon by the prosecutor in the trial court (R. 961, Vol. II, fol. 2881), but not cited by the Circuit Court of Appeals, can be distinguished. The state of mind of the receivers was in issue. The receivers were in the conspiracy as actors. When they refused to sell to recalcitrant marketmen their refusal might be innocent or guilty according to their intention. Their intention and their state of mind as expressed at the time of the transactions constituted verbal acts.

In the case at bar the victims were not actors in the conspiracy—their state of mind or intention was material, but was not the subject of opinion evidence. It was for the jury to decide whether the payments were induced because of fear. The jury should have been left to decide from what was said and done and all of the surrounding circumstances why the money was paid. The Court permitted the witnesses to invade the province of the jury, the witnesses decided an ultimate fact in issue.

We quote from the opinion of the Circuit Court of Appeals in the case at bar (R. 4198, fol. 4200; Appendix p. 104):

> "But although I (Judge Hand) think that it was error to admit the testimony, I do not believe it requires us to reverse the convictions. It might have done so, if the victims had based their fears upon what accused had done in the past; but the testimony did not in this way covertly convey to the jury an accusation of earlier and independent crimes."

Here we submit that Judge Hand must have failed to perceive the record from which we quote (R. 1556, Vol. II, fol. 4671):

> "The Witness Albert Warner: The harm they could do both to the physical property of the company and me personally. * * * That was in my mind, and knowing the record of these people, a murder or two to their credit."

The improper reference to these defendants as bad men generally, was by no means "covertly" conveyed.[11] Nothing could possibly be more damaging.

Judge Hand said further (R. 4198; Appendix p. 105):

> "Indeed, it did not appear that any of the accused on trial had ever called a strike in the past."

Your Honors will see the fallacy of this statement: "The accused on trial" acted through Bioff. Judge Hand substituted terms. This is illogical. The "accused on trial" collected no money.

Judge Hand said further (R. 4198; Appendix p. 103):

> "What they told Bioff of their reasons for paying him was of course relevant—"

Your Honors will perceive from the record that the victims told Bioff nothing.[12] Bioff did the talking. The illegal state of mind testimony was in fact what the government witnesses thought four years after the event.

As to the view held by Justices Swan and Clark in the case at bar, the opinion states (R. 4197, fol. 4199; Appendix p. 100):

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[11] This mistake upon the part of the Circuit Court was called to their attention to no avial in our Petition for Rehearing (R. 4208, Point One).

[12] This mistake was also pointed out in our Petition for Rehearing (R. 4208, Point One).

> "They (the victims) would know why they paid the money, and, the issue once open, no prosecutor should be limited to the bare statement that the threat had been the motive; the victim would be allowed to show in detail just what fears the threat aroused in him."

It not only escaped all of the judges below that this is the rankest hearsay, but all of the judges seem to have overlooked the undisputed fact that the witnesses were permitted to invade the province of the jury. They failed to notice that the existence of fear and what may have caused the fear were ultimate facts for the jury.

Judge Hand said (fol. 4200), that it is difficult to learn from the *Nick case*. We submit that the Circuit Court of Appeals failed to perceive that the *Nick case* should be given no weight at all as authority. The opinion in *the Teamsters case* (315 U. S. 521) is not only of a higher court but it is also more recent than that of *the Nick case*. We submit that *the Nick case* is clearly wrong as to the points involved in the case at bar.

Summary of Point Six.

Barger ran a burlesque house in Chicago. He was falsely designated as unknown to the grand jurors. Bioff forced a partnership upon Barger which originated with Barger's desire to stifle competition. D'Andrea was paid a salary by check although he did not work at the theater. The theory of the government was that this was paid pursuant to the conspiracy charged. The defense claimed that this was money paid for protection as against local police. In any event, it all had no connection with interstate commerce further than the fact that Barger exhibited motion pictures. The Circuit Court adopted a rule

which would put the corner policeman into a national conspiracy to halt interstate commerce, upon receipt of bribe money from Barger, if the policeman agreed that Barger be not arrested for an indecent show. Provided that the burlesque show was sandwiched in with a motion picture.

Point Six.

Evidence of money illegally obtained from a local burlesque theater.

This was referred to as the Barger deal and is complained of (R. 2114, 2121, 2126, 2127, 2131, 2134-2135, 2152) as immaterial and highly prejudicial. The admission of this transaction illustrates a wrong conception of interstate commerce, and the failure to recognize any limit upon the jurisdiction of the federal courts under the Anti-Racketeering Act. There can be no question as to the position taken by the prosecutor. In his argument he said, (R. 3630):

> "The victims are in effect every component in the moving picture business, and that includes Barger."

This improper evidence furnished the only alleged connection of D'Andrea with the conspiracy alleged.[13] The remaining scraps of evidence against D'Andrea are insignificant. Numerous payments were made by check by Barger to D'Andrea within three years of trial, so this improper evidence formed an important link as against all of the defendants.

Bioff (R. 295) and Browne (R. 1146) testified to their relations with the burlesque houses. The story can be found in the testimony given by Barger. (R. 2110) Your Honors will note that numerous objections, based upon

[13] Your Honors will notice that the jury requested a repetition of this evidence after retirement. (R. 3744, Vol. IV, fol. 11,231)

the ground that this evidence was irrelevant were overruled by the court (R. 299) and exceptions were taken. Barger was not named as a victim in the indictment (R. 5), although he had been before the grand jury. (R. 2110) He does not come within the description or class of persons named as victims in the indictment. Barger testified to a local matter having no tendency to establish the conspiracy charged.

The Court should have held that Barger was not engaged in interstate commerce, and that if his theater were closed and the exhibition of motion pictures stopped, the effect on interstate commerce would have been incidental, infinitesimal, and not related to interstate commerce. (*Fox Film Corporation* v. *Trumbull*, 7 F. 2d 715) Anyone should be willing to recognize the fact that the jury should have been left free to conclude from the evidence that this was a local matter. Instead the judge put Barger into this case as a victim without qualification.

The Circuit Court of Appeals said on this point (R. 4194, fol. 4195):

> "They (Maritote and D'Andrea) could not have supposed that they were bona fide employees of Barger; nor is it tenable to assume that a ruthless grasping crew of blackmailers would provide soft births for subordinates who were ignorant of the general nature of the undertaking of which they were beneficiaries."

We trust that your Honors will see the fallacies contained in the above quoted phrases. An understanding of our case would reveal that the fact that D'Andrea was not a bona fide employee of Barger was of no importance. The defense urged at the trial on behalf of D'Andrea didn't suggest for a moment that he was a bona fide employee. He never supposed that he was, and the Circuit Court of Appeals seemed to have in some way thought that that was an issue.

The Circuit Court of Appeals assumed that D'Andrea was a subordinate as to this matter, and that obtaining money by him from Barger imports a knowledge of the guilt of Browne and Bioff as to the federal charge. The Circuit Court failed to understand that D'Andrea may have been a subordinate of some one else, as to a local activity having nothing to do with the case at bar. The Circuit Court of Appeals disregarded the fact that the supposed purpose of the trial below was to try the charge made in the indictment and to keep within federal jurisdiction.

We are not requesting that your Honors weigh evidence or review conflicts. The Barger deal was not proper under the government theory and after conceding the truth of every word Barger uttered. Of course we can not concede that Barger was engaged in interstate commerce.

Summary of Point Seven.

The trial court told the jury that there could be no defense for your petitioners under the Statute of Limitations if anybody, including the accomplice witnesses, did anything within three years, no matter whether the statute had already run as to your petitioners or not. The Circuit Court approved.

Point Seven.

The statute of limitations.

The court eliminated the statute of limitations. We quote from the charge (R. 3733, Vol. IV, fol. 11,199):

> The Court: "If, on the contrary, however, you find that the conspiracy continued after March 18, 1940, and acts were done or proceedings were had which were contemplated by the conspiracy as originally entered into, then the defendants would have no defense under this statute."

Under the law, as announced in the above instruction, no defendant could avail himself of the statute of limitations if other persons performed acts within three years. Acts were performed by Bioff almost up to the date of the return of the indictment.

The above portion of the charge is reprinted in bold face type on p. 64 of our appendix. We have selected only one small portion of the charge of which we complain. Please see other portions also set out in bold face type in our appendix pp. 61, 62, 63, 64, 65. The general effect of the charge must have been to destroy the defense. The jury asked for its repetition after they retired. (R. 3744, Vol. IV)

The defense offered a correct rule of law in Nos. 72 and 73 which we submit was erroneously refused. (R. 3774, Vol. IV, fol. 11, 320; Appendix p. 76) (*Ware* v. *U. S.*, 154 Fed. 577.)

Other portions of the charge also nullified the defense. (R. 3731, Vol. IV, fol. 11,192; R. 3732, 33) We submit that the trial Court had no right to tell the jury that the relation of the conspirators *must* continue, or that once he joins he would remain.

In *Buhler* v. *United States*, 33 F. 2d 382, 384 (C.C.A. 9), the court noted that:

> "The government does not contend that appellant devised or participated in devising the scheme in question, or in its inception had anything to do with or knew anything about it."

In the case at bar the government claims that some of the minor characters joined after the conspiracy was formed.

In reviewing the authorities, the Circuit Court of Appeals for the Ninth Circuit, in the *Buhler case*, said (384):

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character."

The instruction given by the court (R. 3733) is consistent with the charge to the jury, to the effect that any act done by any one binds all defendants.

Your Honors will notice that the trial judge commented on the facts with reference to the Statute of Limitations (R. 3733, Vol. IV; Appendix p. 65).

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue. (*Ware* v. *United States*, 154 Fed. 577.)

We quote from *Boatright* v. *United States*, 105 F. 2d 737, 739:

> "If the testimony is summed up or analyzed, care must be taken to sum up and analyze both sides, and the judge must not become an advocate."

We quote from the remarks of the trial Court on the day of sentence (R. 3842, Vol. IV):

The Court: "Whether or not the conspiracy ended

more than three years before the indictment, in which question was also included whether three of the defendants had withdrawn from it before the three-year period. That also was a question of fact and was submitted as such. The evidence, in my opinion, amply sustained the verdict."

We complain here that the question was not properly submitted as a question of fact.[14]

We quote from the opinion of the Circuit Court of Appeals in the case at bar (R. 4195):

> "The indictment having been filed on March 18, 1943, it was necessary to show that it continued until March 18, 1940, and there was evidence in plenty that it did, although several of the accused were not shown to have continued their connection with it as late as that. To meet this lapse in the evidence as to them, the prosecution invoked the well established doctrine that anyone, once shown to have been a member of a conspiracy which lasts until the beginning of the statutory period, must satisfy the jury by affirmative proof that he disconnected himself from it before that period began. So the judge charged, and he was quite right; we have so lately affirmed such a ruling, that we need only refer to the authorities on which we then relied. *United States* v. *Cohen*, 145 Fed. (2), 82, 90."

We submit here that our points were not answered by the Circuit Court of Appeals. The trial judge was not "quite right." There is nothing in *United States* v. *Cohen*, 145 Fed. (2) 82, to support the instructions given in the case at bar. Here the judge assumed that the conspiracy was a continuing one. An understanding of our complaint requires a study of the entire charge. The jury requested it after they had retired, on the statute of limitations. (R. 3744) Of course government counsel has a right to submit

[14] Please see the appendix where we have copied the charge and commented upon this.

forms and suggestions to the court but the court shouldn't incorporate the argument of the prosecutor into the charge as he did here when he recited the facts as claimed by the government and said (R. 3734; Appendix p. 65):

> "and some other matters to which the government counsel called your attention during his summation."

Summary of Point Eight.

The judge told the jury, in his charge, that he had to be careful because all was being taken down and if he made any mistakes they could be reviewed upon an appeal, and in such event the case might come back for another trial. Naturally the jury understood that a conviction would not be permitted to stand by the Circuit Court if the judge turned out to be wrong. The judge was in error but the Circuit Court did nothing.

Point Eight.

Explaining to the jury that the defendants had a right to review.

It is submitted that the trial Court committed reversible error in telling the jury of the right to review. (R. 3712, Vol. IV, fol. 11,136)

When counsel objected, after the charge was completed, the court attempted to withdraw this charge, but we submit that the error was not cured.[15] It was improper and prejudicial for the court to make reference to the right of review.

[15] The Circuit Court ignored the error. If that court had said that the error was cured by the subsequent action of the trial court we could still argue that that would be like pulling a nail out of a board without expecting a mark. The judge could not very well retract by saying that he had been wrong and there is no appeal. All he could have said would have been to tell the jury that they should not have been told of the appeal. To tell them to disregard any such instruction is just futile.

Also see *Cleveland Ry. Co.* v. *Locke*, 26 Ind. App. 269, 123 N. E. 816.

In *McDonald* v. *People*, 126 Ill. 150, 153, 18 N. E. 817, it was held to be error for the prosecutor to refer to the right of an appeal. We quote (154):

> "In *State* v. *Kring*, 64 Mo. 591, 595, where the jury were told, in the argument, that if they wronged the defendant by finding him guilty, that wrong can be righted by an appeal by the defendant to the Supreme Court, the remark was held to be error. It is there said: 'The statements that the higher court referred to had the power to review the finding of the jury on the weight of evidence, was calculated to induce the jury to disregard their responsibility.'"

This point is not mentioned in the opinion of the Circuit Court of Appeals.

No summary of the misconduct of the prosecutor is possible.

This point cannot be summarized, to our satisfaction, for the reason that it is necessary to understand the entire record in support of our charge that the prosecutor never had any intention of conforming to the rules which should govern a civilized trial.

Every possible device was resorted to in order to slur and prejudice the defendants. The following is a partial list of the instances of which we complain.

The prosecutor said, in substance, that theater owners are vulnerable to acts of vandalism and violence because anybody, by payment of admission, can walk into a darkened theater. Damage to theater property means injury to the public. (R. 3642)

In his argument, he referred to the testimony of Coston and dwelt upon murders, bomb throwing and damage to theaters in 1931. (R. 3665)

The prosecutor testified in his argument that he had been to Chicago and had observed the operation of theaters. (R. 3643)

In his argument, he criticised the basis used by the union in arriving at a wage scale. (R. 3643)

He condemned any defense which the statute of limitations might afford by summarizing it to the effect that the criminal says you have caught me too late. (R. 3632)

After the court had stricken evidence as to a conversation between an attorney, Korshak, and Bioff because the prosecutor had failed to connect the defendants, the prosecutor proceeded to base an appeal to prejudice upon this testimony which had been stricken. He told the jury that these defendants instructed Bioff to perjure himself in his trial. (R. 3700)

After the court ruled that the evidence of a deposit made by union officials to the credit of a baby born to Mrs. DeLucia (R. 314) was immaterial, and the prosecutor prevailed upon the court to admit the evidence for a limited purpose—to show control of the union, then he made use of the evidence in an appeal to prejudice. (R. 3702)

The prosecutor argued that Bioff was convicted of pandering while in the employ of D'Andrea, thereby implying that D'Andrea was in a reprehensible business. Also that D'Andrea assisted Bioff in making false representations to an insurance company. (R. 3637, 3685)

He argued, without any basis in the evidence, that some of the defendants were muscle men delegated to the convention to make sure that everything went right. (R. 3639)

The prosecutor inferred without any evidence, that some of these defendants threatened the life of Sherman. (R. 3640)

He said that the convention hall was policed by some of these defendants without any proof. (R. 3641)

The prosecutor appealed to prejudice by an argument based upon the relationship between Sherman and one Lepke, having no connection with these defendants. (R. 3640)

The prosecutor made reference to Al Capone and assassination having nothing to do with this case. (R. 3664)

The prosecutor appealed to prejudice by an unwarranted argument to the effect that this mob decided to kidnap the Actors' Union, and to give it to one of the defendants to play with. (R. 3682, 3700)

The prosecutor unjustly and with no evidence at all accused Rosselli of shaking down Casey. (R. 3695)

The prosecutor appealed to prejudice as against Rosselli because he happened to have been a guest in the home of Capone, while Capone was in the penitentiary. (R. 3693)

The prosecutor placed McLane upon the stand knowing that McLane had no information material here, merely in order that the prosecutor might argue that McLane was afraid to testify. (R. 3618)

The prosecutor requested the jury to convict these defendants in order that he might secure some of them at a future trial as witnesses. (R. 3710)

In an appendix we have copied a number of excerpts from the argument of the prosecutor to show that he recognized no restraint (pp. 11 to 35).

Point Nine.

The argument of the prosecutor.

We quote from the summation as made by the prosecutor (R. 3716, Vol. IV; Appendix p. 33):

> Mr. Kostelanetz: "Personally, I hope this is not the end of a long road for me, which has extended some four years now, when this case really started.
>
> Without the conviction of Bioff and Browne and Circella these defendants would never be on trial before you, and I look forward to the day when, with your assistance, or I should say when your verdict will make it possible, a situation when one of these defendants will sit on the witness stand just like Bioff and Browne did—
>
> Mr. Eben: I object. That is obviously an improper argument, and I ask that counsel be cautioned with reference to it.
>
> Mr. Kostelanetz: I did not finish my sentence.
>
> Mr. Simandl: This is the second time this same argument is being made, and I say to the Court the first time I let it go by in the interest of what I might say was trying to keep calm. I think it is a deliberate unfair argument.
>
> The Court: I think we might better confine our argument to the present and let the future take care of itself.
>
> Mr. Kostelanetz: Well, I will do that, your Honor. I was just stating my views in the situation."[16]

We submit that the comment made by the court was an endorsement of the improper argument. (*Volkmor* v. *United States*, 13 F. 2d 594.) Your Honors know the prosecutor has no right to seek convictions upon the basis stated. He might very well ensnare innocent men, because the jury is led to believe that a minor character may, in the future,

[16] Please see the appendix here where we have quoted many other instances of improper argument.

become a witness for the government. (R. 3658, Vol. IV, fol. 10,973)

In speaking of the misconduct of the prosecutor in *Berger* v. *United States*, 295 U. S. 78, 85, this Court said:

> "It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct."

We claim the same thing in the case at bar. In many instances, not specifically pointed out by us because of their number, the misconduct was subtle and calculated to have the appearance of being within the rules. We have pointed out some of the misconduct where it is evident that there was no intention to comply with the rules.

We submit that the following, which we also quote from the *Berger case*, is applicable to the case at bar (89):

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The *Berger case* was affirmed in the Circuit Court of Appeals (73 F. 2d 278) where it was held in an opinion written by Judge Learned Hand that the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial. Sometimes the most difficult task confronting a lawyer on appeal is to convince the upper court of the harm done below. We submit that under the circumstances of the case at bar, prejudice to the cause of the accused is certain.

In *United States* v. *Sprengel*, 103 F. 2d 876, after stating that (879):

> "In our opinion there can be no question of the guilt of the appellants. What we must decide is simply whether or not the appellants were granted such a trial in substance and form as the law requires."

The Circuit Court of Appeals said (P. 884):

> "These comments concerning what might constitute the future conduct of the appellants were prejudicial. The appellants were on trial for crimes which they committed, not for a course of future conduct."

The Circuit Court of Appeals in the case at bar said (R. 4201):

> "The supposed excesses of the prosecutor in his summing up to the jury, we have already dealt with upon an application for bail; we then said, and we now repeat; that he did not go beyond 'permissible limits.'"

If such excesses are permissible there is no limit, everything the prosecutor might do or say is "permissible."

If Judge Learned Hand is correct in his views as to what does not constitute reversible error, the right of appeal is an empty formality. Judge Hand said, in *United States* v. *Berger*, 73 Fed. (2) 278, that the responsibility for the result of a trial must rest upon the trial judge and that:

> "mere possibilities do not interest us as they did our forerunners, we demand more tangible evidence that damage has been done."

Your Honors will not blame us if we think that the extreme demands there made are one of the reasons the government chose New York as the forum in our case. The prosecutor is there encouraged to disregard the rights of a

defendant, he is likely to conclude from their opinions that if the Circuit Court for the Second Circuit thinks a defendant is guilty, nothing matters. He is apt to believe that the end justifies the means.

We contend that a study of the opinions rendered in the second circuit will reveal that some of the judges there persist in regarding errors harmless by authority of Section 391, Title 28, U.S.C., because of a failure to appreciate the real intent of Congress.

Please see the dissenting opinion in *United States* v. *Lisa*, 137 Fed. (2) 995 (C.C.A. 2), where Judge Frank has collected the authorities in support of his assertion that his colleagues have failed in this regard. Judge Frank has also written of the duty that court should recognize to the public in a statement of the reasons which impel the court to decide the questions submitted.

The prosecutor even claimed in his argument that the jury should not regard any weakness in his proof in favor of the defense. He argued that the government was helpless because the proof could not be obtained against such as these defendants.

After the judge erroneously gave the prosecutor more latitude than deserved in the introduction of evidence, he employed a number of methods to convey his accusation in those rare instances where the judge ruled against him. He resorted to statements based upon his own knowledge. He argued that facts were proved when he had absolutely no evidence upon which to base his claim. He dragged into the case notorious characters by a mention in a question and claimed that they were associated with the defendants; without foundation in the record he accused the defendants of kidnapping, of shaking down others. His argument was an appeal to passion and prejudice from

start to finish. The record shows it did the defense no good to object for the reason that the prosecutor would make matters worse by persisting in his point even after an objection was sustained. Then too, the judge indicated rather plainly that this illegal argument had the approval of the court. The defendants were helpless. The situation here was even worse than that denounced by your Honors in *Berger* v. *United States*, 295 U. S. 78. Berger was charged with a crime relating to bank notes. These defendants were charged with a crime which the prosecutor enlarged into the general charge that they were gangsters.[17] Even if the legitimate evidence entitled the prosecutor to make the claim and assert that they were such, he should have been held within proper bounds and his overstepping them made the injury irreparable. In *Ippolito* v. *United States*, 108 F. (2) 668, 670 (C.C.A. 6) the trial court admonished the prosecutor for calling the defendants names. The action of the court was not enough to remove the injury. In the case at bar the trial court did nothing to protect the defendants. Courts of review have often, as in *Pierce* v. *United States*, 86 F. (2) 949, 952, spoken of the knowledge gained by those of experience in the trial of criminal cases as to the effect of misconduct on the part of the prosecutor. In the *Pierce case* the Circuit Court was able to see from the record that the prosecutor made a studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict. The insidious design of the prosecutor in the case at bar should be all too plain to anyone with the slightest experience. We are not here concerned with improper argument and conduct springing from the heat and enthusiasm of advocacy. The case consumed eleven weeks. The studied plan of the prosecutor continued

[17] The judge told the jury in his charge that the Act was intended to eliminate professional gangsters (R. 3721).

in operation from start to finish. No doubt he was convinced that the end justified the means. The cumulative effect upon the jury cannot be disregarded as inconsequential.

McLane (R. 2320, Vol. III) was president of the bartenders' union in Chicago. If he had testified fully and freely, it could have been made to appear that possibly that he claimed at one time that some of the defendants committed illegal acts as against him. We don't suppose the prosecutor will claim that bartenders are engaged in interstate commerce or had anything to do with moving pictures. There is nothing in the indictment which could suggest the materiality of anything McLane might have to say. McLane took the stand and refused to identify any of the defendants. The prosecutor called McLane for only one purpose, and that was to prove that McLane was afraid to testify. See *Putnam* v. *United States,* 162 U. S. 687; *United States* v. *Biener,* 52 F. Supp. 54.

Summary of Point Ten.

After the jury had been out and had sent notes to the judge indicating an inability to agree and a failure to remember certain testimony, the judge, according to his own statement, stopped in the jury room. The Circuit Court designated this as a mere "informality" and concluded, without foundation, that no harm was done. In another circuit it has been held that where the record fails affirmatively (as here) to disclose that no prejudice did result, the verdict cannot stand.

Point Ten.

Communication with the jury after retirement.

The record (R. 3744, Vol. IV, fol. 11,231), shows that the jury retired at 11:55 A. M. and at 12:50 P. M. the following occurred:

(Italics supplied)

> "The Court: I have received the following note from the jury: 'Barger's checks to D'Andrea and ledger sheets of Barger's books.
>
> 'The evidence (Barger against D'Andrea).'
>
> 'Barger's testimony against D'Andrea.'
>
> "They wish to have read the evidence of Barger against D'Andrea. *On my way in here I stopped in the jury room* and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we come back.
>
> (Recess until 2:15 P. M.) (After Recess. The jury came into the courtroom.)
>
> The Court: Ladies and gentlemen, do you want all of Mr. Barger's testimony read?

Juror No. 9: Just in regard to the payments of money to Maritote and D'Andrea.

(The testimony was read to the jury, starting at page 2921 and ending on page 2946 of the record.)

The Court: I do not know, there is some more testimony in here. Do you want me to go on, as I imagine there is something on cross-examination. Is there anything more you wish me to read?

The Forelady: That is all.

The Court: All right; you may have those exhibits that you asked for. Will you please hand them to the jury? You may retire and resume your deliberations.

(Jury retired again at 2:42 P. M.)

(The jury came into the courtroom at 4:30 P. M.)

The Court (after reading note from jury): You have requested that the portion of the Judge's charge which deals with the statute of limitations be read to you. It will now be read.

(The portion of the charge incorporated on pages 5224 to 5230 was read to the jury.)

(Jury again retired at 4:45 P. M.)

(The following occurred at 5:54 P. M.)

The Court (after reading note from jury): The jury want the Warner Bros. checks pertaining to moneys paid to Kaufman. Will you please get them and deliver them to the jury?

(At 7 P. M. a recess was taken until 8:30 P. M.)"

At 10:05 P. M. the jury returned and announced the guilty verdict.

We have copied the entire record on the subject and wish to call attention to the fact that the judge makes reference to three notes received by him from the jury. The judge made no effort to incorporate the notes in the record nor does the record show that he exhibited them to counsel. The judge didn't even claim that he had stated all that was contained in the notes. We have no record of

what the jury said and what the judge said when the judge stopped in the jury room. The judge does not undertake to say that he wished to have the record show that he had reported all of his conversation with the jury.

In *Ah Fook Chang* v. *United States*, 91 Fed. (2) 805 (C.C.A. 9) the foreman came into the chambers of the judge, asked a question and received an answer in the presence of counsel and returned to the jury room. Judge Haney said (p. 810):

> "The instant case is not one where the whole jury was instructed directly by the court either orally, or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required. *Shields* v. *United States*, 273 U. S. 583. Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. *Little* v. *United States*, 73 Fed. (2) 861. The jury received an instruction second hand, and not by the judge. Chances for error are too great. Presuming the error to be prejudicial, the rule in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, is applicable and requires reversal."

We quote from *Little* v. *United States*, 73 F. 2d 861 (C.C.A. 10), holding that there should be no communication between court and jury except in open court and discussing the effect of error (867):

> "No outsider has any business in the jury room; much harm could result, and that is enough. The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

After the jury retires we submit that even a federal judge is an outsider.

Your Honors will notice that there were a number of communications between the judge and the jury in person and by way of notes no doubt conveyed by the marshal. See *Shields* v. *United States,* 273 U. S. 583. We submit that when the judge read the direct examination of Barger he should have read the cross-examination without consulting the jury.

The Circuit Court of Appeals said:

> "—it appears with certainty that no harm has been done."

We fail to see how language could be more plain than that above quoted from *Little* v. *People,* 73 (Fed. 2) 861. May we suggest that:

> "It is much easier to require the observance of the mandates of the law, than to determine in what cases they may safely be dispensed with." (*Guykowoski* v. *People,* 1 Scammon 476, 480 Illinois.)

In the case at bar the Circuit Court regarded this as a mere informality and concluded that no harm had been done. This holding conflicts with *Little* v. *United States,* 73 F. (2d) 861. The various circuits are in conflict as to how to apply Section 391 of Title 28 U. S. C.

In *Fina* v. *United States,* 46 Fed. (2) 643 (C.C.A. 10), the jury was returned into open court in the absence of the defendant and a question asked by the jury was answered by the judge. We quote (644):

> "The government in this case apparently concedes the action of the trial court in giving, in effect, a supplemental charge to the jury after it had been out deliberating for some time, without notice to the defendant or his counsel, and, in their absence was erroneous, but contends the burden is on defendant to show prejudice. We cannot agree with this contention at all. In fact, the record is silent as to what was said by the court to the jury. Hence to be re-

> quired to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible. Such is not the law. This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

In the *Fina case* the judge did what he did in open court. There might have been some chance for the defendant to learn from a bailiff, a clerk, a reporter or a bystander what actually transpired. But where the judge steps into the jury room, what chance has a defendant? Judge Pollock, in the *Fina case*, collected some of the authorities including *Lewis* v. *United States*, 146 U. S. 370. There is to be found a note in 22 A. L. R. 241, 261 upon the subject.

The Circuit Court, in the case at bar, said (R. 4196, fol. 4198):

> "But, like other rules for the conduct of trials, it is not an end in itself; and while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. *Dodge* v. *United States*, 258 Fed. Rep. 300; *Rice* v. *United States*, 35 Fed. (2) 689, 696 (C.C.A. 2); *United States* v. *Graham*, 102 Fed. (2) 436, 444 (C.C.A. 2)."

Permit us to review the authorities cited by Judge Hand here:

Dodge v. *United States*, 258 Fed. 300 (C.C.A. 2) The defendant was convicted of espionage. The jury sent a note to the judge to ask if they could convict on the first count. The judge replied "yes". After a review of the authorities, the Circuit Court said:

> "In the instant case it is evidence that no

> possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment."

Your Honors will notice that insofar as is shown by the opinion in the *Dodge case*, the judge did not enter the jury room and the record was made by the judge to show all that transpired which constituted an affirmative showing of no possible prejudice.

Rice v. *United States*, 35 Fed. (2) 689, 696 (C.C.A. 2). In this case the jury asked for the exhibits and the judge was asked over the phone in the presence of counsel what should be done, and it was agreed that the exhibits should be sent out. No case could be further from our case on the facts. The judge in the *Rice case* did not go to the jury room, he did not talk to the jury on the telephone and counsel agreed upon sending out some exhibits. Judge Manton said (696):

> "A belated objection on appeal, urging this to be error, is now presented. The objection is that the trial judge was not personally present in the courtroom throughout the entire trial, and therefore that denied the appellants a trial by jury, due process of law, and a public trial. No such constitutional guaranties were breached by what transpired. The exhibits went in by consent of counsel. This was sufficient. *Dodge* v. *United States*, (C.C.A.) 258 F. 300, certiorari denied 250 U. S. 660, 40 S. Ct. 10, 63 L. Ed. 1194. The failure of the trial judge to be present is not fatal to the judgment. It was a harmless error, if one was committed, which involved no substantial rights of the parties. Section 269 of the Judicial Code as amended, 28 USCA sec. 391."

So your Honors perceive that the objection made in the *Rice case* had nothing to do with our point.

United States v. *Graham*, 102 Fed. (2) 436, 444 (C.C.A. 2) is not in point here. The judge did not enter the jury room and the record in the *Graham case* also shows all that happened which was in writing. After jury had begun its deliberations a copy of the charge was requested and by the court's direction it was sent to jury room just as it had been delivered in open court. It was held that such fact did not require reversal notwithstanding counsel were not present or previously advised of such action. 28 U.S.C.A. Sec. 381 was cited.

We believe that in all cases where communication with the jury by the judge is complained of and the transaction is held to be not error, or the error is held to be harmless, the record has been made to show what transpired and the upper court could see that no harm could have possibly resulted.

The correct rule to be applied where the judge by his misconduct makes it impossible for the defendant to show what transpired, is to presume the error to be prejudicial. The judge and the prosecutor had every opportunity to cause the record to show what actually happened. We quote from *Ray* v. *United States*, 114 F. (2) 508, 513 (C.C.A. 8):

> "Private communications even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure and the judiciary."

In *Wheaton* v. *United States*, 133 (2) 522, 527 (C.C.A. 8) Judge Sanborn reviewed the authorities and said that the law is that if it appears that communications have taken place a presumption arises that they were prejudicial.

Summary of Point Eleven.

The Circuit Court, in the case at bar, improperly failed to state some of the points involved and incorrectly stated others and rendered an opinion which does not disclose the grounds of decision.

Point Eleven.

Opinion Rendered by Circuit Court.

We quote from the dissent by Judge Frank in *United States* v. *Liss*, 137 Fed. (2) 995, 1001, 1002:

"But whatever may be the views of judges about the jury system, it is their duty to maintain the function of the jury in all jury trials, until the jury is abolished by legislation and constitutional amendment. And that means that, in a criminal action tried before a jury, a defendant should not be convicted unless the jury finds him guilty—after a fair trial. Perhaps I am old-fashioned in saying that I believe that the doctrine of 'harmless error' does not dispense with the necessity of a fair trial of a defendant whom the appellate judges believe to be guilty. A jury trial does not seem to me to be fair when it plainly appears that the jury has not been well informed as to the facts. As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, no matter by what unfair tactics it was persuaded to do so, we judges, in actual fact, decide the case.

"I cannot subscribe to a rule that what is substantial reversible error depends not on whether it probably affected the jury to the substantial prejudice of the defendant but on whether we appellate judges think the defendant guilty or innocent. If that is to be the rule, I would urge that criminal jury trials be abolished

as expensive and time-consuming shams. I have known lawyers who assert that only by such a rule can the jury system be made 'workable.' But such a rule renders the jury system workable by not working it; if we happen to think that the jury system is impractical and unworkable, let us frankly say so; then our citizens, informed of the realities, can decide whether to dispense with it.

"At a minimum, if we are to adopt the rule described above, we should make that fact unmistakably clear, so that the public will thoroughly understand what a jury trial now really is—and is not. The 'principle of publicity,' which governs in the American judicial process, calls not only for trials held in public but also for the publication of judicial opinions that disclose the grounds of decisions; that publicity is illusory if the true grounds are not stated. To adopt a rule of decision concerning jury trials without publicizing it prevents the public from knowing how its government operates. That is unwise in a democracy where the workings of all branches of government should be plain to the citizens. There can be no true democracy when citizens are treated like infants who must not be told the facts of life; mysteries as to the workings of government impair one of the most important features of democratic participation—the capacity of citizens intelligently to criticize and seek changes in those aspects of government which they consider undesirable—and breed a sense of frustration and a cynicism which may pave the way to the destruction of democracy."

Conclusion.

In the case at bar, we are certain that the record reveals that the prosecutor could have named anybody from Chicago whom he might believe to be connected with a gang and he could have convicted him without evidence. Worse still, we believe that the record shows that Bioff here was granted an opportunity to be judge, jury and executioner. It is a serious reflection which has been brought on by them-

selves, but the machinery of the court was placed in the hands of an accomplice witness of whom the Circuit Court said (R. 4192) that the fabric was woven out of the testimony of a man with a long, discreditable and criminal past, confessedly guilty of perjury in an earlier examination of the same transactions here in question. We cannot be reasonably sure that Bioff included here only guilty persons. The method adopted by the prosecutors to attain its ends is shown here to be disgraceful. The danger of having caught some who are not guilty at all is real and serious.

The fact that the courts below have paid absolutely no attention to constitutional limitations upon federal jurisdiction is obvious from the record.

We conclude with the words of the late Judge Anderson (173 Fed. 227):

> "To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this."

A "proceeding such as this" and a great deal more unlawful and unjust has been highly successful in the case at bar up to now. Your Honors stand squarely between the constitution and a serious rape of it by the government officials.

Respectfully submitted,

WM. SCOTT STEWART,
Counsel for Petitioners.

(3)

FEB 10 1945

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
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Petitioners,

vs.

UNITED STATES,

Respondent.

APPENDICES

The Anti-Racketeering Act,
The Indictment,
Argument of Prosecutor,
Charge of Trial Court,
Refused Instructions,
Opinion of Circuit Court.

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

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This is submitted together with our brief in support of a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

THE STATUTE.

(The Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, United States Code, Title 18, Section 420a (a) (b) (d), commonly known as the Anti-Racketeering Act.)

Interference with Trade and Commerce by Violence, Threats, Etc.; Penalties.

(420a) Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce —

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts, shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both. (June 18, 1934, ch. 569, sec. 2, 48 Stat. 979.)

420b. **Same; definitions.**

(a) As used in section 420a of this title the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used in section 420a of this title shall not be deemed to include wages paid by a bona fide employer to a bona fide employee.

(c) The term "trade or commerce" as used in section 420a of this title, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction. (June 18, 1934, Ch. 569, sec. 1, 3, 48 Stat. 979, 980.)

420c. **Same; prosecutions.**

Prosecutions under sections 420a-420e of this title shall be commenced only upon the express direction of the Attorney General of the United States. (June 18, 1934, Ch. 569, sec. 4, 48 Stat. 980.)

420d. **Same; jurisdiction of offenses.**

Any person charged with violating section 420a of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided*, That no court of the United States shall construe or apply any of the provisions of sections 420a-420e of this title in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legiti-

mate objects thereof, as such rights are expressed in existing statutes of the United States. (June 18, 1934, ch. 569, Sec. 6, 48 Stat. 980.)

420e. **Same; separability clause.**

If any provisions of sections 420a-420d of this title or the application thereof to any person or circumstance is held invalid, the remainder of said sections and the application of such provision to other persons or circumstances shall not be affected thereby. (June 18, 1934, ch. 569, Sec. 5, 48 Stat. 980.)

THE INDICTMENT.

In the District Court of the United States
For the Southern District of New York

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oaths present:

That heretofore, to wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the date of the filing of this indictment, in the Southern District of New York and within the jurisdiction of this Court, Frank Nitto, alias Frank Nitti, Louis Compagna, alias Louis Cook, alias Lefty Louie, alias Little New York, Paul de Lucia, alias Paul Ricca, Phil D'Andrea, Francis Maritote, alias Frank Diamond, Charles Gioe, alias Charlie Joy, Ralph Pierce, John Rosselli, and Louis Kaufman, hereinafter referred to as the defendants, together with George E. Browne, William Bioff, alias Willie Bioff, and Nick Circella, alias Nick Dean, not indicted herein but hereinafter referred to as the confederates, and divers other persons to the Grand Jurors unknown, in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of

money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations, including Loew's Inc., Paramount Pictures, Inc., Twentieth Century-Fox-Film Company, Warner Bros. Pictures, Inc., and other firms, persons and corporations whose names are to the Grand Jurors unknown, all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said valuable considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear.

That this prosecution has been commenced upon the express direction of the Attorney General of the United States.

That said Browne and Bioff, confederates herein, during the period hereinabove set forth, were and are connected with a labor union, to wit, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, hereinafter called the IATSE, in the capacity of president and personal representative of the president, respectively.

That Circella, confederate herein, and said Kaufman, defendant herein, during the period hereinabove set forth, were and are connected with a labor union, to wit, the IATSE, in the capacity of international representative of the IATSE, and business agent of Local 244, affiliated with the IATSE, respectively.

That during the period hereinabove set forth, the victims were and are engaged in trade and commerce between States and with foreign nations, in the District of Columbia and in territories of the United States, that is

to say, said victims are in the motion picture business engaged in world-wide and nationwide, foreign and interstate trade and commerce, in the production, distribution and exhibition of motion pictures, directly and indirectly through subsidiary corporations and various agents and contractors.

That it was a part of said conspiracy that Frank Nitto, Louis Compagna, Paul De Lucia, Phil D'Andrea, Francis Maritote, Charles Gioe, Ralph Pierce, and John Rosselli, defendants herein, together with divers other persons to the Grand Jurors unknown, would dominate, control and direct the operations of said labor union, to wit, the IATSE.

That it was further a part of said conspiracy that said defendants and said confederates, during the period hereinabove set forth, would obtain and attempt to obtain, by the use of and attempt to use and threat to use force, violence and coercion, the payments of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, and would obtain the property of the aforesaid victims, with the consent of the aforesaid victims, induced by wrongful use of force and fear, that is to say, by demanding that said victims pay over to said defendants and said confederates the aforesaid sums of money and other valuable considerations for protection, viz., to prevent and dissuade said defendants and said confederates from restraining, impeding and obstructing the production, interstate distribution and exhibition of motion pictures of the aforesaid victims throughout the United States and otherwise injuring and destroying and attempting to injure and destroy the business of said victims.

That it was further a part of said conspiracy that said defendants and said confederates, by use of the position and power, influence and control of said defendants and said confederates and each of them in and over said IATSE, would obtain and extort money and other valuable considerations, in the amount and by the manner and means heretofore set forth from said victims for the said defendants' and said confederates' own use and benefit; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 2 (a) (b) (d) of the Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, United States Code, Title 18, Section 420a (a) (b) (d), commonly known as the Anti-Racketeering Act).

SUMMATION FOR THE GOVERNMENT.

EXCERPTS SHOWING PORTIONS OF ARGUMENT OF PROSECUTOR MADE TO THE JURY AFTER THE CLOSE OF ALL EVIDENCE, OF WHICH WE COMPLAIN.

(We have interspersed our comments here in bold face type.)

* * * Now with respect to the facts of this case I wish to stress that you can use the evidence of what the witness says and you can also use the evidence of how a man testifies. Because very frequently how he testifies is even more important than what the witness happens to say. In this connection I would like to call your attention specifically to the manner in which Goverment's witnesses from Chicago and from Newark testified. They took the stand and after being sworn they took their left hand and put it in the right hand so their hands wouldn't shake. I wonder if you remember that.

Mr. Murray: Your Honor, I object to that. I object to it because there is no such evidence. Much as I dislike to interrupt Mr. Kostelanetz I do not think it is fair comment.

Mr. Kostelanetz: I would like to suggest, if your Honor please—

The Court: Let us go on with that, please.

Mr. Simandl: I would like to record my objection to that, if the Court please.

The Court: Yes.

Mr. Simandl: I think it is unfair.

The Court: Unless the jury observed it, it will be disregarded.

R. 3619. The remark of the court made matters worse by implying that if the jury did see it, it should not be

disregarded. (See Quercia v. United States, 289 U. S. 466, 471.) The prosecutor referred to McLane (R. 2320). His demeanor should have had nothing to do with the case because his credibility was not in issue. Nothing was proved by him.

There was one witness whom the defendants could have called who was literally lurking behind the door, that door over there (indicating). You heard the testimony of Smith as to what Gioe said to him, "We are taking care of Nick Circella, we are taking care of his family, too." There was the man who was lurking behind the door and the defense could have called him. I couldn't have called him if the defense are paying for his family and support as well as then vouch for his credibility, too.

R. 3623. Circella had been convicted with Bioff and Browne. He was present in court but did not testify. Your Honors know that the prosecutor misrepresented his reasons for not calling Circella. He had no right to argue that the defense was obliged to call Circella.

The prosecutor has no right to cast the burden of proof upon the defense and to argue their failure to call witnesses such as Zwillman and Lepke, notorious characters not shown to have any knowledge of the case, or any connection with the defense, although they were put in the case by innuendo of the prosecutor.

Let us take the witness Hochstein, also known as Whiteman—the testimony about Mr. Miller and the renting agency. Where are the hoodlums who attended the 1934 convention, the six friends or so? They could have been called to give you some light. Where is D'Andrea's lawyer who went to see Emory? Where is Mr. Korshak?

Summation by Government.

You remember with respect to Barger he went and showed you how he tried to subpoena Barger and couldn't get him. There is a method of showing that a witness is not available to you, and we have had no explanations with respect to those. Even with respect to Kaufman. You recall the testimony of Jacocks as to who it was put the gun on the table. Where is that comrade in arms and why wasn't he produced before you? And where are Zwillman and Lepke? They are not around here.

Mr. Wegman: I think that is highly objectionable, your Honor. I submit that is a grossly unfair argument and ought not to be made.

Mr. Kostelanetz: I think the United States——

The Court: Just a moment. I think much of this summation upon the subject of calling witnesses is entirely immaterial to the matter anyway and that goes for both sides.

R. 3624. The Court failed to perceive that the burden was on the government. The Court here destroyed a legitimate argument made by the defense and put the defense attorneys in the same category as the prosecutor who was charged with the burden of proof. The defense had a right to argue the fact that the government failed to call witnesses shown to be in its control. It is unfair for the prosecutor to usurp this right and apply it to witnesses not shown to be connected with the defendant by anything stronger than the argument of the prosecutor.

Mr. Kostelanetz: * * * I can assure you ladies and gentlemen that if we had been able to show what the defendants did with the money, Mr. Murray would be

on his feet, and properly so, objecting that we are trying to try an income tax case instead of an extortion case. The issue here is not what the defendants did with the money. They could have given it to the Salvation Army. It is the way that the defendant got it that is the important thing.

R. 3624. This is an unfair argument. It would have been proper to show what DeLucia did with the hundreds of thousands of dollars in order to corroborate Bioff. We can't complain here of the lack of logic, but the defendants did have a right to be protected against misrepresentation on the part of the prosecutor. The fact that defense counsel would object was not the reason that the evidence was not offered. The evidence was not produced because the government did not possess it.

While at this point there was no duty on the Government to check Roach's story in any way, in the interest of truth and in the interest of bringing the facts to you as best we could find them, before the trial concluded the F.B.I. immediately went on the job to locate Mrs. Lawerenz and see what she could testify to and bring that to you.

Roach was shown to have been a perjurer and the jury had a right to believe that the slightest check up would have disclosed his purpose to perjure himself before trial, if the prosecutor did not in fact know that Roach was inventing his story.

Now, somehow, the defendants got wind of the fact that the F.B.I. was checking to find Betty Lawerenz and that we did not accept the explanation given by the witness Kugel that Betty Lawerenz was in South America. That brought the conference——

Mr. Wegman: I object to that point. Mr. Kostelanetz says that we got wind that the F.B.I. was checking it. Mr. Kostelanetz knows that we were out looking for Betty Lawerenz and that the F.B.I. was covering the trial after us. That is a grossly unfair statement. The implication is miserable and it is uncalled for, and he should not make that sort of statement.

The Court: The question is, isn't it a matter of evidence.

Mr. Wegman: The matter of evidence is the record that was made before your Honor. He says that when Roach was called these matters we knew all about. That is not the fact. He knows how we dug them up over that weekend, and he knows all about it. I think the implication is dastardly. Didn't we plead with your Honor not to let Roach go on the stand?

The Court: The matter of evidence of what was done by both sides I think was read into the record by Mr. Eben. I think Mr. Kostelanetz is making a fair comment upon what is in the record.

Mr. Wegman: I respectfully except.

Mr. Kostelanetz: A conference was brought about in the Judge's chambers. That conference immediately preceded my reading into the record a prepared statement, not of what the Government conceded would be the truth in the case but what the Government had found out since Roach last testified as to what Betty Lawerenz would testify to if she were called, and what the record of the Arlington Hotel would show and what the record of the Medinah Club would show.

Now with respect to Roach's testimony, I think you can come to at least two conclusions, and here I tell you now I am not talking about facts. I am talking about

inferences which you can draw from this whole Roach episode.

First I would like you to observe that Roach testified not only against Kaufman but the defendant Compagna, the defendant Diamond, the defendant Gioe, and in effect Roach also testified against Longy Zwillman, and necessarily the testimony was of a nature which would normally incur the enmity, the wrath of Longy Zwillman. People in their right senses do not go around incurring the wrath of an underworld character.

Here the prosecutor argues that the testimony of Roach must be true because these defendants are underworld characters.

Mr. Wegman: Objected to.

The Court: There is no testimony that he is an underworld character.

Mr. Kostelanetz: Very well. There is testimony in the record, ladies and gentlemen, that Zwillman was a man with respect to whom Lepke had some relations sufficient to tell Zwillman who should vote for Browne.

Mr. Wegman: There is no proof that Lepke ever told that to Zwillman.

The Court: There is no proof that he told him anything, but there is proof of an association, some proof. The jury may consider the evidence upon that subject. Go ahead.

The prosecutor was not talking about association. He was claiming something about a conversation when there was absolutely no proof of it.

Mr. Kostelanetz: Now, ladies and gentlemen, I say this: Mr. Murray in his summation has described Lepke

for you. He said you can refer to the newspapers and you know from the newspapers who Lepke is. Now I say to you that no man in his right senses would testify—would give perjurious testimony against an associate of Lepke, unless that man were telling the truth. On the other hand, if you are determined that Roach was not telling the truth, and I think the evidence strongly indicates that way——

The Court: I am going to charge the jury that they must entirely disregard his testimony, Mr. Roach's testimony.

Mr. Kostelanetz: Very well, if that is the case, I won't ask you to draw the inference of why Roach possibly testified the way he did testify, but I think that inference can be drawn by you. But on his Honor's instructions there is no necessity for that.

R. 3627, 3629. This announcement by the Court, if at all proper, should have been made before the arguments or during the defense argument.

Now finally there is the statute of limitations defense. That is a rather technical defense, but still a defense, and if it exists you have to give recognition to it. The statute of limitations defense can be summarized like this: the criminal says, "Yes, I committed the crime all right, but you have caught me too late." However, I do not think you have to worry about the statute of limitations defense at all. The Court will charge you what the law is on the subject, and factually these defendants never stopped working on March 18, 1940, or whatever date it was, not by a long shot. * * *

R. 3632. It is fair to infer that the prosecutor drew these instructions or knew what they were to be. There

can be no doubt now from the record that the jury would not "have to worry about the statute of limitations defense at all." The instructions destroyed the defense.

We think Willie Bioff is a vicious and evil character. We have not only thought that so, but we did something about it, we put him in jail. I had the honor of being associated with Mr. Correa at the time when we prosecuted Willie Bioff, and that landed him in jail. The Government of the United States is definitely not holding out Willie Bioff to you as any example of virtue. We know he is a gangster. We also know that he was associated with gangsters, and when you get into a den of racketeers who plot against decent people like you, you can only get evidence against racketeers when the racketeers fall out among themselves.

Why, I have never known of any decent people who would sit down with racketeers and plot. People like yourselves, like myself, would be afraid to go near racketeers.

I can assure you that the prosecution has made no promises whatsoever to Willie Bioff with respect to his sentence.

R. 3635. Even if this had been true, still the prosecutor had no right to testify.

Among lawyers it is a general standard of good manners not to call your opponent to the stand unless it is absolutely necessary. So I had a former assistant of mine, now a lieutenant in the Army, Lieutenant Paul McDonald, I had him come into the courtroom and be identified. They could have called for McDonald.

The supposed good manners of the defense prevented

them from calling the prosecutor, so he proceeded to testify without being called, and without being sworn or subjected to cross-examination. What could the defense want with McDonald?

The chronological survey of the series of events of this conspiracy indicates that this story originally started with the activities of a Chicago hoodlum named William Bioff. You have heard about his early life, how during the years 1920 to 1930 he worked in gambling houses for Rio, for Circella, and for the defendant Phil D'Andrea; how during this time he was convicted for pandering, and how the syndicate with which he was connected sent him a lawyer to represent him, and according to Bioff he never learned of the affirmance of his conviction in that case until many years later. This small time subordinate of Rio, of Circella, and of Phil D'Andrea, was in 1932 working at his trade, which was racketeering in the chicken business in Chicago. * * *

R. 3637. This is a plain insinuation that D'Andrea had something to do with a business which would give rise to a pandering charge against Bioff. The defendants were not shown to have been connected with Bioff in whatever he did in the chicken business in his early years. If it was a racket the defendants were not on trial for the crime.

You will notice that Rio for some reason not explained, seems to have disappeared from the scene at this early talk in 1934, and then reappears at the June, 1936 convention of the IATSE.

R. 3638. Upon the day of judgment the prosecutor told the court that at this time Rio was absent from Chicago

because of an indictment (R. 3807). No doubt the prosecutor was trying his best to insinuate some such prejudicial matter here in his argument.

Mr. Kostelanetz: You will recall the identification of Bioff in Sidney Kent's statement to Austin Keough, that Bioff was a member of the Capone gang, and that they were desperate men.

This is based upon a conversation by Keough with Kent who was dead at the time of the trial (R. 1812, Vol. II). The conversation took place a year after the Chicago strike. No one but Kent and Keough was present. It was the rankest hearsay. The entire record shows that the victims did not even know that Bioff had any associates outside of the union. This hearsay is made use of over and over by the prosecutor for the purpose shown here. The Court refused to strike it because the Court believed that it was proper as a state of mind.

There were meetings at his house and they were attended by the leaders, by DeLucia, by Compagna, the defendants here, by Rio, by Nitti, by Bioff, Browne, Circella, and as well by Lepke Buchalter on one occasion;

Capone, is well known, and it was proved, was in the penitentiary at the time of some social gatherings in his house. These gatherings had no place in the record, they were not meetings in the sense implied, nothing germane here was even mentioned, nor did the use of his house by his wife furnish evidence of the implication of Capone.

and the text of these two first meetings at the Hochstein house in Riverside was this: first, that there was a million or two millions to be made; that the boys wanted Browne's loyalty; that they had connections in different parts of the country, and that these connections had said they

would contact and see that Browne would win. * * * And in addition certain members of this mob were delegated to the convention to make sure that everything goes right, and that is where our friend Frank Diamond makes his first appearance. The proof of what happened at the convention is not thoroughly forthcoming unless you examine each and every one of the eight hundred men who appeared at the convention and assume that they would all tell the truth.

R. 3639. Some of those who attended the convention appeared as witnesses in the case. There was no truth to the position taken by the prosecutor and this was unfair practice. The prosecutor failed to prove an important link in his chain for the simple reason that it was not founded on fact. Then he resorts to this practice to explain his failure of proof.

And the defendants' witness, Sherman, testified to another incident at that convention, that among other things Lepke Buchalter took $2,000 from him to go to the convention as his bodyguard, and the Judge asked Sherman, "Why did you need a bodyguard?" And Sherman said, "My life had been threatened." There was some cross-examination, and it seems the guilty flyeth where no man pursues, because nobody asked him who threatened his life. Was it Compagna, DeLucia, was it Diamond? No, he said the party who threatened him was Tom Malloy, if you can believe it.

R. 3640. The only evidence in the record as to who threatened Sherman was given by Sherman. It does not make any difference whether the jury believed Sherman or not on this point. Sherman had tried to secure the support of the Chicago Local for an office in the union. The

fact that he took a man named Buchalter to the convention should not have been used against any defendant in the case.

* * * Sherman, a member of the IATSE, a politician in the IATSE, he knew with whom he was dealing, and he went to Lepke and paid him a fee.

R. 3640. How could anything done by Sherman be regarded as evidence against any defendant here? What difference should it make what Sherman knew or thought? This is but a sample of what the prosecutor, in all earnestness with the dignity and weight of his powerful office, called upon the jury to regard as evidence.

Regarding this unanimous vote in 1934 and the fact that there was no opposition, suppose you were a delegate to that convention and you saw the hall policed by Circella, by Bioff, by Frank Diamond, by Lepke Buchalter, whose job it was to get Browne elected, would that have any effect on your independent judgment, particularly when there was nobody running against Browne?

R. 3640. There was no evidence that the persons named were policing the hall, and no evidence from which any such inference can be drawn, and there was no evidence that the job of Lepke Buchalter was to get Browne elected. There is no evidence that anyone else wanted to run, or that any delegate was improperly influenced by any one.

There was always the fear that trouble with the IA in a theatre would close the places where production of films is carried on.

In addition, theatres are particularly susceptible to acts of vandalism, and you know that I think fairly well

from the testimony, that they can be committed under the cover of darkness. Theatres are dark inside and hoodlums just cannot be detected. Stench bombs have been used in theatres. Other types of bombs have been placed in theatres, including one with a 4,000 seating capacity in the City of New York. A bomb was found under the roof. Expensive booth equipment has been spoiled by some judicious wrecking.

Coston testified that men were killed in Chicago in 1931 during the strike there; that fronts of theatres were blown out, and all types of damage done.

The managers of ordinary types of enterprises can protect themselves from acts of vandalism and violence by simply locking their doors and just admitting certain people, but in the case of the theatre, the theatre owner has to keep his doors open all the time. Anybody paying an admission fee can walk in and do pretty much anything he wants under cover of darkness and get away; and then the theatre owners must always be conscious of the fact that he is dealing with the public, young and old, and that damage to the theatre property in most instances means injury to the public which comes to the theatre. So there is no wonder that theatre owners or theatres, are vulnerable to strikes and even to threats of strike.

R. 3642. Is there any doubt in the mind of your Honors that the prosecutor tried the defendants for causing strikes and that he used the hearsay evidence in an appeal to prejudice and passion?

With regard to the question of whether there should be one man in a booth or two men in a booth, I am not going to take sides on it except to say that I have been to Chicago in the course of the investigation of this case,

and the motion picture theatres apparently operate there just like they operate here.

R. 3643. The prosecutor was not sworn here and had no right to testify as he did.

Tommy Malloy, the business agent of the operators' union, was assassinated in February, 1935. Rio died a couple of weeks later, and Bioff talked to Circella and to Nitti and to Rio just before Rio's death; and the substance of the conference was to threaten to put two men back in the booths of the major circuit theatres in Chicago, and that this threat would result in some money coming up. It is undisputed, it is unchallenged in the record, that the origin of this thing came from the mob.

R. 3644. The record shows that Malloy made money out of the abuse of his power as a union official in Chicago. The defendants were not shown to have any connection with Malloy.

Regardless of the defendants' contention, the evidence, which is the only thing you have to go on—the evidence in this case shows that the demand for the money came from Bioff. This is the fact, not conjecture, and that the payment was not voluntary, as the defendants would want you to believe. If the thing was voluntary I am sure that the defendants would have called witnesses to the stand the same way that the Government has called them to prove it.

R. 3648. The indictment (R. 5) charges that the money was obtained with the consent of the victims. This may have been a reference to the failure of the defendants to testify. All those concerned in the payments, Bioff, Browne and the victims did testify. Whom did the prosecutor mean, if not the defendants?

Summation by Government.

Now I would like to digress for a minute and go to Louis Kaufman's case. We are still on local situations. We have shown you so far that the stem of this conspiracy was a certain mob in Chicago together with certain officers of the IATSE whose power could be used to take money from the motion picture industry. The background again for Kaufman's role is testimony of Bioff and Browne that there was an underworld empire with connections all over the country and that contacts of the various units would produce the election of Browne. * * *

Now, the contact in the Newark area for this group out in Chicago was Longie Zwillman.

Mr. Wegman: Your Honor, I do not like to object. I would be very glad to wait until Mr. Kostelanetz finishes his argument to put this objection on the record but I am mindful of your Honor's admonition that you wanted us to object at the time so that it would be fresh in mind, and that is, there is no proof whatever in this case that there was any underworld character. There is not any proof. There is only the hearsay of Bioff. There is not any proof that these alleged persons in Chicago at this meeting ever communicated with Zwillman in any way or that Zwillman ever communicated with Kaufman. There are those essential gaps in the argument that Mr. Kostelanetz now offers, and for him to say that there is evidence that this so-called Chicago gang that he refers to had underworld contacts, and in Newark it was Zwillman, and that connected him with Kaufman, is to overlook completely the fact that there has been no proof that Buchalter or anybody else ever did communicate with Zwillman or that at that time Zwillman ever knew Kaufman. That is the vice of the argument. It jumps those wide open gaps.

The Court: All he said so far, as I understand it is that the contact of the so-called outfit in Chicago was Zwillman in Newark. That is all I heard him say.

Mr. Wegman: That is right, and my point is that there is no proof that Zwillman was the contact man. There is simply the statement of Bioff on the witness stand, not corroborated by Browne, that Buchalter says he would see Zwillman, but there is no proof that any of the Chicago people knew him, and there is no proof that Buchalter ever did see Zwillman.

The Court: I understand the evidence is that Buchalter made this statement in the presence of the people who are charged with the conspiracy here.

Mr. Wegman: That is right, but there was nothing to connect that with Kaufman.

The Court: I will permit counsel to proceed. What the evidence is the jury will determine.

Mr. Wegman: I respectfully except.

Now you also remember the house at Riverside where this notorious Lepke Buchalter was instructed to contact Lucky Luciano to see that Local 306 voted for Browne, and Lepke saying, Oh, I will take care of that, you don't have to contact Lucky, I will take care of 306, I will handle Sherman. And then this is at page 150: "I will also see Kaufman of Jersey, I will see Longie, and see to it that Longie delivers Kaufman." Now that is the identification of Longie Zwillman on the record, and you can form your own opinion and conclusion who Longie Zwillman is.

Now it is perfectly obvious that Kaufman had a guilty conscience about these transactions, and there are three ways that you can tell that independent of the trans-

actions themselves. He threatened prospective witnesses in that speech that he made at the union meeting.

It is a fact that in Kaufman's case there are certain things that are absolutely clear, that are absolutely uncontradicted and unchallenged and undisputed. That is that a Chicago mob together with certain officers of the IA controlled labor in the motion picture industry; that the Chicago mob had some connection with a man named Longie Zwillman. Despite objections of counsel here I must perhaps remind you that Longie Zwillman is not on trial here. Kaufman is. It may be reasonably inferred by you just what kind of a character Longie Zwillman is in New Jersey. There is evidence that Kaufman was Zwillman's henchman.

I say to you ladies and gentlemen that as far as Kaufman is concerned the status of this case at present is exactly and precisely the same as the status that was enjoyed by Bioff and Browne two years ago. I submit that as far as Kaufman is concerned you have the opportunity to pass on Kaufman and you have an opportunity to have another jury some months from now pass on Kaufman's higher-ups, in the same way as you have had an opportunity to review the higher-ups behind Bioff and Browne. I say to you it is perfectly clear in this record that Longie Zwillman is to Kaufman what Compagna was to Bioff and Browne. And you cannot reach people of that type unless you have people of the type of Bioff and Browne testifying.

R. 3658. The audacity of this argument should shock this court. How can it be said that it is within permissible limits or that it did not prejudice the defense?

In view of Warner's and Keough's knowledge of Bioff, I think Bioff's relatively innocuous statement of "I am coming over to see you" has as much meaning as if Al Capone said equally innocuously, "Come and take a little ride in my car."

R. 3664. Here again the prosecutor furnishes his personal opinion. Warner and Keough were not shown to have a knowledge of Bioff which included Capone at the time of the payments. The fear suggested here by the prosecutor is not charged in the indictment; fear of bodily harm or death.

And then one day this mob decided to give Charley Gioe something to play with, and they decided to kidnap the actors' union for him.

R. 3682. The actors union transaction had no place in the record and it was unfair to use the word kidnaping.

Did he get the story out of his head, or is it the most obvious answer that his clients gave him the information?

It is unfair for a prosecutor to claim that a lawyer must have gotten information from his client as a basis for questions asked in the trial of an accomplice witness.

It is apparent these defendants made Bioff account for every penny he received and made him account not only for the dollars and cents involved but for the exact methods that he used in obtaining the money. The testimony is uncontradicted that Bioff turned over the money to DeLucia, to Compagna, to Circella and to Gioe.

A great weakness in the case of the prosecution was that Bioff never said that he told Compagna or any defendant how he got the money.

They thought up a new and ingenious answer "We, Phil D'Andrea and Francis Maritote, we are fixers, and we fix anything you have. We fix the police, we fix the Mayor, anyone." That is the contention of the defense of Maritote and of D'Andrea in this case.

R. 3684. The fact that the truth of the matter put the defendant D'Andrea in a bad light as a fixer in a local matter should not have been used by the prosecutor in such manner as an appeal to prejudice. There was no basis for his claim that this was new.

Before we proceed to the Barger situation, let us take a look at Phil D'Andrea and Frank Diamond again. Bioff identified D'Andrea as a man for whom he worked from 1922 to 1930 in various illicit enterprises, as he worked for Rio and Circella, and it was during that very time that Bioff was convicted, and in that conviction back there—in 1925 when Bioff needed a phony legitimate occupation to apply for life insurance, he gave Mr. D'Andrea's brickyard, and you can take it for what it may be, and he gave D'Andrea's company as the so-called employer, and that he, Bioff, was the general manager of that brickyard.

R. 3685. The fraud committed by Bioff on the life insurance company in 1925 should not have been used against D'Andrea in this trial. This appeal to prejudice on the subject of pandering here repeated should alone demonstrate the unfairness of the prosecutor.

Bioff has known Frank Diamond since he has known D'Andrea, and you will remember again how Diamond was appointed to be one of the muscle men, so to speak, at that 1934 convention, and actually attended it at the

direction of Nitti, and as Browne testified as well, and his presence there was corroborated by Dr. Papp and also by the witness Olson, who testified that at the instruction of Browne, and with money given to him by Browne, Olson paid for the hotel bills of this coterie that came down from Chicago to make sure that everything went right.

If Barger had any questions as to who Diamond was those questions were easily resolved when he saw Diamond at Ralph Capone's house. That is in the testimony.

R. 3688. According to the prosecutor, it was a crime to visit a home of a relative of Capone. Barger didn't pay because of the character of the man who picked up the money on the theory of the government. Bioff applied the pressure.

Again, if I may use this vernacular that we have become so accustomed to in the course of this trial, that we have become educated in it, I would say that it would appear that Rosselli was as handy with a couple of grand, so to speak, as our friend Kaufman and his associates were handy with a gun.

R. 3692. This slur is based entirely upon the testimony of a defense witness who saw Rosselli in possession of some money at the time Rosselli contributed to a charity. No connection with the case was shown.

Now the next thing that happens is that we find our friend Rosselli a house guest, or dinner guest, at Al Capone's. I think I am stating the obvious when I say that we legitimate people, folks like you, folks like me,

do not wind up at Al Capone's house as house guests right in the middle of the national shakedown.

R. 3693. This is repeated over and over again. It should not have been allowed in evidence at all and surely the visit was not a circumstance in the case to prove guilt.

It is perfectly obvious that Rosselli knew what was taking place and whatever the relationship between him and Pat Casey was, and I think the relationship spells equally just another kind of a shakedown.

R. 3695. Here the prosecutor testifies again as to his opinion. This is not very becoming when it is observed that Casey was in the employ of the movie producers and available to the prosecutor, although not called as a witness. There is no basis in the evidence for the opinion of the prosecutor upon which this accusation could be made as against Rosselli.

You first remember Gioe in 1934 when Browne was driven out by Pierce to see Rio, when Rio appeared with Bioff at the Carleton Hotel. Then Gioe for some unexplained reason disappears until 1936; in the Summer of 1936 he attends the convention with Nitti in Kansas City.

* * * It was Gioe who was supposed to be the beneficiary of the unsuccessful kidnapping of the Actors' Union. * * *

The Court: I think the use of the word "kidnapping" is rather rhetorical. I do not know whether the evidence quite justifies it. I will leave that to the jury.

R. 3700. The prosecutor was away out of bounds and the court should have known that there was nothing to leave to the jury.

Summation by Government.

* * * and the testimony is uncontradicted that it was Korshak who told Bioff to prepare that phony defense at the prior trial, and you have heard all about that defense. * * *

This was stricken when the prosecutor failed to connect Bioff's testimony to any defendant.

I think this, that the testimony of Gioe concerning his attempts to stifle and to corrupt this investigation that grew to this indictment and to this trial is technically known among lawyers as consciousness of guilt, and thus evidence of guilt itself, and that is a very common sense proposition. If a transaction is open, if it is above board, there is no reason as Gioe did to get people to testify falsely, to frame defenses, to tell people to run away and hide. On the other hand, if a man has a guilty consciousness, if he knows the transactions are not above board, he will lie about it and he will tell other people to lie. That is what lawyers call the consciousness of guilt.

I do not think it is necessary for me to run through in any detail the story of Browne, or how he was taken, how he was kidnaped in this case, how these defendants, DeLucia and Compagna, how they issued the orders. That is all over the case and runs all through the case. * * *

R. 3702. We submit that the use of the word "kidnaped" was not rhetorical and that it was unjustifiable.

You will even recall how these people slipped from time to time, and you have seen the records in here where Bioff through Isadore Zevin opened an account for a member of DeLucia's family.

R. 3702. When the court ruled that this evidence was not admissible, the prosecutor succeeded in putting it in for a limited purpose (R. 314, Vol. I). It really has no

value, but observe the manner in which the prosecutor twists things and makes use of evidence for a different reason after it is in.

Well, Bioff and Browne, they were under instructions from the outfit, from the boys, communicated by Korshak, and you have seen his mysterious hotel bills with the telephone calls, and confirmed later by DeLucia and Gioe direct. The instructions were to see that Bioff got the money from the industry and gave it to Joe Schenck to build up a fund to fight legislation. According to Korshak they got that idea from studying the record in the Schenck income tax case.

R. 3704. The fact that this evidence was stricken did not deter the prosecutor from its use.

Again I say this to you, that you have the opportunity by your verdict to tell the victims of all racketeering that they can come forward, that they can safely come forward, and then can complain to law enforcement authorities, and that swift and that certain retribution will follow from juries, whoever these racketeers may be.

Personally, I hope this is not the end of a long road for me, which has extended some four years now, when this case really started.

Without the conviction of Bioff and Browne and Circella these defendants would never be on trial before you, and I look forward to the day when, with your assistance, or I should say when your verdict will make it possible, a situation when one of these defendants will sit on the witness stand just like Bioff and Browne did——

Mr. Eben: I object. That is obviously an improper argument, and I ask that counsel be cautioned with reference to it.

Mr. Kostelanetz: I did not finish my sentence.

Mr. Simandl: This is the second time this same argument is being made, and I say to the Court the first time I let it go by in the interest of what I might say was trying to keep calm. I think it is a deliberate unfair argument.

The Court: I think we might better confine our argument to the present and let the future take care of itself.

Mr. Kostelanetz: Well, I will do that, your Honor. I was just stating my views in the situation.

R. 3710. A mere statement of this argument should show that it is not within permissible limits, it was unfair and prejudicial. The remark of the judge only added fuel to the flame.

On the other hand, as I know that for the purposes of the trial, you are really the voice of the people to protect the public that you represent, to protect the people like yourself and myself, who occasionally go to the movies and who send their children to the movies, and that is the point of view which I am sure you will take and that I am most interested in having you take in considering this case.

This is an appeal to passion based upon the illegal testimony relative to bombings and danger to movie theaters. No such charge was embraced in the indictment. Even if the defendants were guilty, there is no proof that they damaged any theater or interfered with any children, not

to say anything of the prosecutor's children or the children of the jurors. This surely was not within permissible limits.

In submitting this case to you, as far as the Government is concerned, I am sure by your verdict you will serve notice to racketeers, to mobsters, to racketeering labor leaders like Louis Kaufman and to all similar gentry, that they have got to get out of American industry and American labor and that if there is any effort on their part to extend their racketeering activities to those fields, that those activities will be met by swift and by certain prosecution and punishment.

R. 3711. It is apparent that the prosecutor made use of the Act to police the internal affairs of the union.

CHARGE OF THE TRIAL COURT TO THE JURY.

The bold face type here is part of the charge set in this manner to point up the errors.

The Italics contain our comments.

The Court: Ladies and gentlemen, we are about at the end of a long road and I think I would be remiss in my duty if I did not extend my thanks personally and the thanks of the Court to you for your diligent service during the last two and a half months, and for your patience and close attention to the evidence which has been given in the case. I think, too, that I should also express my thanks to these eminent gentlemen who have tried the case, for the courteous manner in which they have acted towards me and for their obvious effort to do their best for their clients.

I had intended to discuss at considerable length the evidence in the case, but after working on the charge last night I concluded that I would not trespass upon your patience any longer, so that by reason of my reformation I may have saved you more than an hour and perhaps two hours of more conversation upon subjects which have been adequately discussed before you. I hope to make my charge as brief as possible and to discuss practically only questions of law.

You will pardon me if I read my charge, because this is an important case and everything that I say is being taken down, and if I make mistakes they can be reviewed upon an appeal if an appeal is taken or is necessary, and if I make error, it may come back.

R. 3712. This coupled with a repetition in a little different language, really amounts to a directed verdict of guilty. The jury knew, of course, that a not guilty verdict could not be reviewed.

Charge of the Court

On March 18, 1943, the defendants were indicted by the Grand Jury of this Court, the indictment alleging that between June 18, 1934, and the date of the indictment, they, with George E. Browne, William Bioff, Nick Circella, and others unknown, unlawfully conspired and agreed together to obtain, and to attempt to obtain, by the use of and attempt to use, and threat to use, force, violence and coercion, upwards of $1,000,000 from Loew's, Paramount Pictures, Twentieth Century-Fox, Warner Bros. Pictures and others engaged in the production, distribution and exhibition of motion pictures, between the several states of the Union, and with foreign nations. It is also alleged in the indictment that Browne and Bioff, Circella and the defendant Kaufman were connected in an official capacity with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators—the I.A.T.S.E.—Kaufman being the business agent of Local 244 in Newark. It is also alleged that the defendants, with other persons unknown, would dominate, control and direct the operations of the I.A.T.S.E. and would obtain the moneys mentioned from the moving picture industry to prevent or dissuade the defendants and their confederates from obstructing the production, distribution and exhibition of motion pictures throughout the United States, and otherwise injuring the business, the moneys so obtained or sought to be obtained being for the personal use and profit of the defendants and not for services rendered.

The statute under which the indictment is laid became a law on June 18, 1934, when the conspiracy is said to have commenced, and is known as the Anti-Racketeering Act. Insofar as it is material here, it provides that any person who conspires or acts concertedly with any other person or persons in connection with or relation to any act in any way or in any degree affecting interstate com-

merce, to obtain, or attempt to obtain, by the use of, or attempt to use, or threats to use, force, violence or coercion, the payment of money or other valuable considerations or to obtain the property of another with his consent induced by wrongful use of force or fear, shall be guilty of a felony.

R. 3713. The exception in the Act was not deemed material by the court.

It is charged here that that law has been violated, and it is your and my duty to endeavor to determine whether that charge is true. While our duty is joint, still it has two domains in which each of us acts. It is your obligation to receive the law from me, as it is my duty to endeavor correctly to explain it to you. That is my domain.

I think it is important that I emphasize that, because, as I have already told you, if I make a mistake in telling you what the law is, my mistake can be reviewed. If you think you know the law better than I do and you attempt to apply such law as you think that law to be in your jury room, nobody knows what law you applied. It cannot be reviewed, and if you make an error it can never be talked about or changed or corrected.

R. 3714. After we demonstrated to the Circuit Court that the judge had made grave mistakes, that court should have reversed. The trial court not only erred in a discussion of the matter of review, but as it turned out, he created a false hope. Naturally the jury would have relied upon the judge for the law, but here they were asked to hope that the Circuit Court would perceive any error and grant relief.

Your domain has the determination of the facts, that is, the determination of what the evidence shows the

facts to be. You are solely responsible for that. Your recollection controls as to what the evidence is. **My statement of those facts is not binding upon you, if it disagrees in any respect with your recollection.** And, similarly, statements of counsel are not evidence, nor are they binding upon you. **You are the sole judges of the facts and your recollection controls in the event that it disagrees with mine or with that of counsel.**

R. 3714. Recollection of the facts in this case was not near as important as the inferences to be drawn from them on vital issues.

You will at once see that you are an important branch in the administration of justice. You have a two-fold obligation, to assist in the enforcement of the law and to protect the innocent. The government wants no innocent man convicted, but on the other hand, it strongly urges upon every trier of facts that no guilty person escape. It is most important in a government such as ours that its laws be enforced, not only for the maintenance of the government, but also for the protection of each of us in our security, property and safety. On the other hand, there is no dearer right belonging to all of us than to be protected in our liberty if we have done nothing to deserve its curtailment. **Your obligation then is just as strongly present in the protection of the innocent as it is under those statutes which the government has seen fit to enact with reference to this particular situation.**

R. 3715. The court told the jury over and over again that the Act was designed to punish these defendants.

In your determination, you are not to be guided or governed in any way by passion, prejudice, public

opinion or sympathy. Both the public and the defendants have the right to demand that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give each your conscientious judgment.

The guilt of each defendant must be separately considered by the jury and separately determined. No defendant may be found guilty unless each and every juror is convinced beyond a reasonable doubt that such defendant actually participated in the conspiracy charged in the indictment with a view towards furthering its objects.

But if you decide that the defendants or any of them are shown beyond a reasonable doubt by the facts to be guilty, such defendant or defendants cannot for any reason of sympathy, or for any reason of what his punishment may be, be absolved from the consequences of his act or from the consequences which follow the violation of the law.

Of course, you are not to suffer yourselves to be prejudiced against any defendant because of the fact that he is charged with this offense, nor to convict him for fear that crime may go unpunished, or for the purpose of deterring others in the commission of like offenses. You must not convict a defendant unless every fact necessary to establish his guilt has been proven to you beyond a reasonable doubt.

There are some general observations which I wish to make and which seem generally to have been made in cases involving the prosecution of crime.

As I have already told you earlier in the trial, the finding of the indictment is no evidence that the same or any part thereof is true. It is no more than a charge

notifying the defendants that the government claims they have violated the particular statute mentioned in it.

The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you must not permit that fact to weigh in the slightest degree against him, nor should this fact enter into your discussions or deliberations in any manner.

The defendants are at all times presumed to be innocent and such presumption remains with them from the beginning of the trial and prevails until overcome by evidence which satisfies you beyond a reasonable doubt of their guilt.

R. 3716. The correct rule requires that the presumption continue on into the deliberations of the jury (Dodson v. United States, 23 Fed. (2), 401; People v. Ambach, 247 Ill. 451). A correct instruction was refused (No. 24, R. 3735).

You must, of course, bear in mind that when I speak of innocence or of circumstances susceptible of the hypothesis of being innocent, I use the word innocence as referring to the particular and specific crime charged in the indictment and not to morals or wrongdoing generally.

The government is required to prove each essential part of the offense charged beyond a reasonable doubt. A reasonable doubt is one based on reason which can be supported by argument and discussion, one for which you can give a reason if called upon to do so. It is not an arbitrary or capricious doubt. Neither is it one born of a natural reluctance which most people have to perform a difficult or unpleasant task or as an excuse for failing to convict if the evidence justifies a conviction.

It is, of course, not necessary for the government to prove the guilt of the defendants or any of them beyond any possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. The reason for this is that it is practically impossible for one to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough if the defendant's guilt be established beyond a reasonable doubt, not beyond any possible doubt.

You are instructed, of course, that a defendant is not obliged to prove that he is innocent of the charges made against him. On the contrary, the burden of proving his guilt beyond a reasonable doubt is upon the government and remains with the government throughout the trial. And if the government has failed to satisfy you beyond a reasonable doubt that any defendant is guilty, you must acquit such defendant. And the burden of proving guilt beyond a reasonable doubt applies to each and every essential element which is a part of the offense charged and which elements I shall call to your attention shortly.

If you find that any witness for either side has wilfully testified falsely to a material fact, you may disregard the entire testimony of such witness. You are not required to do this. You may accept so much of such witness's testimony as you consider truthful and disregard the balance. In this connection I instruct you to disregard the testimony of the witness Roach in its entirety.

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment and thus places upon the government the bur-

den of proving such defendant's guilt beyond a reasonable doubt.

Some of the facts claimed to have been proven are based upon circumstantial evidence. Circumstantial evidence is that evidence which tends to prove a fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which it is sought to establish. Such circumstantial evidence is entirely proper and legal and can be made the basis of your verdict. This kind of evidence, however, to warrant a conviction must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by such defendant; or in other words, the facts proved must be entirely consistent with and point to his guilt only, and must be inconsistent with his innocence. If the evidence upon any essential element of the case, or upon the whole case is as consistent with the innocence of any defendant as with guilt, it is insufficient to warrant a conviction of such defendant.

If during the course of my charge, I shall make, or if at any time during the trial of this case, I have made any statement of opinion or of fact in favor of one side or the other, or if I have made, or may make, any statement as to what the evidence shows which disagrees with your recollection, you are not bound to accept my opinion or my version of the evidence. Nor, as a matter of fact, are you bound to accept the opinion or version of the evidence of any of the counsel in the case. When I say that, I do not mean to discredit anybody. I say it because I wish to emphasize that you are the sole judges of the facts, and your recollection as to what the evidence is will control over any statements which may be made or may have been made by the court or by counsel. In the

last analysis, the responsibility is yours to decide the questions of fact and to render your verdict accordingly.

Evidence that was stricken out during the trial should not be considered by you as having any bearing upon the result.

At times evidence has been admitted as against one defendant and not as against the others. That evidence should be considered only as against the defendant or defendants with respect to whom it was admitted.

If any evidence has been admitted and afterwards stricken out, you must disregard the matter stricken out, if any counsel has intimated by questions which the court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inferences based upon them. If counsel upon either side have made any statements in your presence concerning the facts in the case, those statements are not evidence unless they are proven and you must look entirely to the proof in ascertaining what the facts are. Of course, a stipulation or agreement between counsel as to a certain fact is proof of that fact.

During the course of the trial I have made certain rulings upon motions and upon objections. My rulings are not to be taken by you as any indication of the guilt or innocence of any defendant. Counsel have the right to object to the introduction into evidence of any testimony or exhibit offered by the opposing party. My rulings, therefore, are upon matters of law with which you have no concern and should not influence you in the slightest degree.

The question of the credibility of witnesses and the weight to be given to their testimony is peculiarly a matter within your province, and entirely for your determina-

tion. You are not bound to give the same weight to the testimony of each witness but should give the testimony of every witness such weight as you think it is fairly entitled to receive. You may take into account the appearance upon the stand of the respective witnesses, their apparent candor or lack of candor, their demonstrations, if any, of prejudice or bias, their intelligence, their means of information, their accuracy of recollection, their contradictions, what they are seeking to accomplish, and the reasonableness and probability of the testimony that each one gives.

Comment has been made by counsel with reference to irregularities in the book entries of the moving picture organizations and the secreting by them of the payments to Browne, and Bioff, and the possible reason for them. They are, of course, matters to be considered by you upon the subject of credibility of the witnesses and the nature of the transactions referred to, and the other matters to which your attention has been called. Of course, no one likes the idea of books not properly reflecting the conditions of a corporation, but you must remember at the same time that the officers of the corporations are not on trial for falsifying books, if those entries were, as a matter of fact, false or improper. The defendants here are on trial for a definite offense against the moving picture industry, and the law, and the only thing that you have to consider as respects these other witnesses is as to whether they told the truth when they gave the testimony that they did give upon the trial. We are not trying Nicholas Schenck, Austin Keough, or the Warner Brothers, or anyone else but the defendants here on trial. Whatever you may think of the moving picture business as a whole, or particular moving picture producers, has noth-

ing to do whatsoever with the question as to whether these defendants are or are not guilty, except insofar as you think that the testimony of such witnesses as have testified is not entitled to full weight and consideration, and whether other inferences may be drawn contrary to or irreconcilable with their statements.

Of course, William Bioff and George E. Browne are accomplices and co-conspirators. Much has been said in the summations as to these two men who have been convicted for the very same crime with which the defendants are now charged, and whom, it is charged, were conspirators with them. You will, of course, consider all that has been said upon that subject, but in federal courts there is nothing which forbids the conviction of a defendant upon the uncorroborated testimony of an accomplice or co-conspirator. The testimony of an accomplice or co-conspirator is not to be rejected unless you think it has no weight. Like any other fact, it is to be taken up and dealt with by you. If accomplices could not be used, there are many cases where there may be real guilt and where conviction would not be obtainable. Accomplices, therefore, are used, and properly used, and their evidence is properly to be considered by the jury. Compare it with all the facts and circumstances surrounding the transactions, to the end that you may satisfy your minds and consciences whether they have testified to the truth or not. Testimony of accomplices should be considered very carefully and should be scrutinized with the utmost circumspection. Their testimony, of course, should not be rejected if it is believed, if it sustains the contention of the government, if there are facts and circumstances from which it can be plainly perceived by you that these men, criminals though they may be, and participants in

this crime though they may be, nevertheless, have told the truth.

The statute under which this indictment is laid is said to have been passed by Congress in an endeavor to eliminate terroristic activities of professional gangsters.

R. 3721. This follows what was said in 315 U. S. 521, as to the legislative history of the Act, a subject which was of no concern of the jury.

It is obvious that under it there are certain essentials which must be proven by the government beyond a reasonable doubt.

1. **It must be shown that the conspiracy mentioned occurred in connection with or in relation to an act in some degree affecting interstate commerce, or an article or commodity moving in such commerce; and that the defendants, or such of them, if any, as you may find to be guilty, knew that the purpose of the conspiracy was to affect interstate commerce and not merely the exhibition of motion pictures. But in this connection, you may consider that if the motion picture industry was engaged in interstate commerce and that the defendants, or such of them as you may find to be guilty, knew that one of the objects of the conspiracy was to extort money from such industry, and that the natural effect of such extortion would be to affect interstate commerce, that would be sufficient.**

R. 3721. This is the same erroneous position taken by the Circuit Court which runs counter to Schecter

Poultry Co. v. *United States, 295 U. S. 495, and Mutual Film Co.* v. *Industrial Com., 236 U. S. 230 (see also R. 3731).*

2. There must have been a conspiracy between the defendants, or some of them, and Browne, Bioff and Circella, to obtain, or attempt to obtain, by use of or attempt to use, force, violence or coercion, **the payment of money from the moving picture industry, or to obtain from the moving picture industry such money, with the consent of the firms, persons and corporations engaged in that industry, induced by the wrongful use of force or fear.**

R. 3722. It will be noticed that the moving picture industry is regarded as a unity including the exhibition of films.

And that such of the defendants as you may find to have been parties to such conspiracy became such parties intentionally and with knowledge of the purposes of such conspiracy, and for the purpose of furthering its aims and objects; and when I say intentionally and knowingly, I mean that they became such parties with bad purposes, without justifiable excuse, and without grounds for believing such purposes and conspiracy to be lawful.

The word "knowingly" in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware that he cannot lawfully do the act with which he is charged; facts and circumstances which, if followed up, would lead to such knowledge as would put a man of ordinary prudence or exercising ordinary care on his guard. Guilty knowledge may be established by proof of circumstances which would induce belief in a reasonable mind that the

undertaking upon which he was about to engage was unlawful.

Let us take up each requisite separately. It does not seem to me that there is any contradiction as to the first one, that is, that whatever was done was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce. Nothing was said about it in the summations, as I remember, and I presume there is no question about it remaining in the case under the undisputed evidence.

R. 3722. The Court was in error in stating that nothing had been said about this in summation (R. 3378, 3398, 3503, 3504 Vol. IV). Here the court applied the literal meaning of the Act and took the question of interstate commerce from the jury. (See also R. 3721.)

The second requisite is that there must be shown to have been a conspiracy to obtain or to attempt to obtain money or property from the moving picture industry, by the use, or attempted or threatened, use, of force, violence or coercion. That must be found by you as an independent fact as it is the very basis of this indictment.

R. 3722. All through the charge the court regards the industry as a unity as did the Circuit Court.

A conspiracy is said to be proven when there exists a combination of two or more persons by concerted action to do an unlawful thing. The common design is the essence of the charge. It is not necessary, to establish a conspiracy, to prove that two or more persons met together and entered into a formal and explicit agreement or understanding, or that they directly, or by words or in

writing, said what the unlawful scheme was to be, or the general understanding or detail of the plan, or the means by which such unlawful combination was to be made effective. If they intentionally work together for a common purpose, and that purpose is the illegal act charged as their object, and if the acts of the parties so dovetail and fit together that the conclusion is inevitable that there was an understanding between them as to the thing to be done as charged, it would establish a conspiracy. It would not be necessary that each of the parties take part in all of the acts involved, or profit evenly, or that he participate in every detail of their execution. It is not necessary that all should be parties to the conspiracy from the beginning. If the parties act together to accomplish something unlawful and it is obvious that they are acting pursuant to some agreement, express or implied, a conspiracy is shown, even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not previously have associated together. One defendant may know but one other member of the conspiracy. But if knowing that others have combined to violate the law, and such party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

It is enough that such person connected himself with the criminal conspiracy, even though he was unaware of its full extent.

R. 3723. The vice of this abstract proposition is that one could not be guilty without knowledge of that which gives the federal court jurisdiction, i. e., interstate commerce.

It makes no difference, however, whether one of the conspirators plays a subordinate part in the unlawful agreement at a remote distance from the others. Some members in every conspiracy play minor parts, sometimes because they have not the intellect nor the boldness to conceive, nor the mental ability to execute the criminal venture, but, nevertheless, they may be parties to a conspiracy, and guilty.

If one later becomes a party to the conspiracy with knowledge of its purpose, he may be presumed to have adopted whatever may have preceded his joining. Where several parties are proved knowingly to have combined together for the same illegal purpose, any act done by one of the parties in furtherance of the concerted plan, and with reference to the common object, is the act of all of the parties, no matter when, during the existence of the conspiracy, it is done. It is not even necessary that each individual conspirator be fully informed concerning the scope of the conspiracy. Knowledge may be a matter of inference from the facts proved.

As I have said, the conspiracy constitutes the offense charged here and it must be made to appear from the evidence beyond a reasonable doubt before any defendant can be convicted, that he was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to and within a period of three years prior to March 13, 1943, the date when the indictment was found. Before the acts or declarations of an alleged co-conspirator may be considered in evidence against a defendant, you must find that a conspiracy existed, that such defendant at the time of the acts and declarations charged against him was a member of said conspiracy, that the acts and declarations of an alleged co-conspirator which were given in evidence was a member of said

conspiracy, and that such acts and statements were in furtherance of the conspiracy charged in the indictment. Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy, without agreement to cooperate to accomplish such object, or purpose, is not enough to constitute one a party to a conspiracy; it is necessary to prove that he actively participated in the conspiracy charged.

Declarations made by one conspirator to another are not alone sufficient to establish a connection of another defendant with the conspiracy.

R. 3725. Such hearsay was in fact made use of by the prosecutor. The court should have made it clear that such testimony alone, or in combination could not be used to establish connection (Glasser v. U. S., 315 U. S. 60; Nibbelink v. U. S. (C.C.A. 6) 66 Fed. (2) 178, 179).

Even if you find that Bioff obtained money from the motion picture industry by extortion, and that he was associated with the defendants, or some of them shared in such money, that would not be sufficient to warrant a conviction unless you also find that there was a conspiracy among the defendants for the purpose of extorting money from the moving picture industry, and that such defendant was a party to that agreement with knowledge of its object and also for the purpose of furthering its aims.

It is not necessary that the government prove the existence of the conspiracy by direct proof of a formal understanding or agreement. From the nature of the case usually such proof is impossible. Conspiracies are not formed in that way. Conspirators do not go out upon the public highways and proclaim their intention. They accomplish

their purpose by dark and sinister methods and must be judged by their acts. Such a conspiracy, therefore, may be proved by circumstantial evidence and you may infer its existence, under the rules that I have given you, from all of the facts and circumstances of the case presented by the evidence. **Among these facts and circumstances it may be said that the acts and proceedings of the defendants or any of them, as proven beyond a reasonable doubt, showing that they were knowingly acting in concert for the accomplishment of a common purpose, or particular end—here it is charged their individual profit—may be considered by you as proof of the existence of a conspiracy in violation of law.**

R. 3725. The objective of individual profit was made controlling by the court instead of the intent required by the act. The individual profit of Bioff, Browne, Compagna and DeLucia could not be disputed, yet more important questions were ignored.

The third requisite makes it necessary, in order to convict any of the defendants, that it be shown beyond a reasonable doubt that such defendant was intentionally and knowingly a party to the alleged conspiracy for the purpose of furthering its objects. Mere acquaintance or association with the other parties to the conspiracy or some of them or the mere receipt of money, or mere suspicion, is not sufficient. When I use the word "knowingly" that necessarily carries with it the implication that the entry into the conspiracy must have been intentional. Intent is, therefore, an element of the offense charged, and it must be established by the same degree of proof as any of the other elements that enter into the completed offense. You must consider in this con-

nection all of the facts disclosed in the evidence. You must take into consideration the conduct of the parties with relation to the matter charged, and every circumstance which bears upon the issue, having in mind that a man is presumed to intend the natural consequence of his act, intentionally or knowingly done. You will determine what the intention of each individual defendant was from your consideration of all their acts and statements, their relation to each other, the object to be attained, the things that were done, the circumstances under which they were done, and the motives which in your mind prompted the various acts so far as is disclosed by the evidence.

It must be shown beyond reasonable doubt, that the conspiracy was intentionally formed by the defendants, or some of them, for the purpose of obtaining or attempting to extort the payment of money or other valuable considerations, from persons or corporations engaged in interstate commerce in the production, distribution, or exhibition of motion pictures, by the use of or attempt to use or threat to use force, violence or coercion.

R. 3726. Here again the court regards the exhibition of pictures as interstate commerce.

In this connection, it is not necessary that it be shown that they were successful in obtaining money. The forming of the conspiracy or agreement to attempt to so obtain such money by force, violence or coercion, constitutes the crime, and whether they were successful or unsuccessful would, therefore, make no difference. However, in this case, there is ample proof that money was obtained, and one of the questions involved, is whether or not it was obtained by extortion.

Charge of the Court.

Much has been said during the summation with reference to the contention that the moneys which Bioff and Browne obtained were bribes rather than moneys obtained by extortion. The contention is important for the reason that these defendants have been indicted for criminally entering into a conspiracy to extort or to attempt to extort money from the motion picture industry by threats and fear. That is the only crime with which they are charged, and that is the only crime of which they may be found guilty, if the evidence justifies it. If you find that the conspiracy was to commit the crime of bribery and that is all they conspired to do, or if the evidence fails to convince you beyond a reasonable doubt that the agreement and conspiracy was to extort money from the moving picture industry, you must acquit.

The two crimes of extortion and bribery can be distinguished. Extortion is defined in the very statute under which this indictment was laid as being the obtaining or attempting to obtain by the use of or the attempt to use, or threat to use, force, violence or coercion, the payment of money or other valuable considerations; or obtaining the property of another with his consent induced by the wrongful use of force or fear. A much similar definition is found in the Penal Law of the State of New York, which defines extortion as to the obtaining of property of a corporation with the consent of an officer, agent, or employee thereof, induced by a wrongful use of force or fear; and the fear which will constitute extortion may be induced by an oral threat to do unlawful injury to the property of the corporation.

Bribery is defined in some of the United States laws as the giving or offering to give or causing to be given any money, property or value of any kind to an official

of the government to influence his action, vote, opinion or decision. Under the New York State law, which, of course, does not govern this particular question, but is mentioned solely for the purpose of definition, bribery is defined in substantially the same manner as in the United States statute, and insofar as a labor official is concerned, it makes it a misdemeanor for a person to give or offer to give any money or other thing of value to a duly appointed representative of a labor organization, with intent to influence him with respect to any of his acts, decisions or other duties as such representative, or to prevent or cause a strike by the employees of any person or corporation. Under both statutes not only he who gives the bribe but also the one who receives it commits a crime.

Bribery is an offense against public justice which is defined as the voluntary giving of anything of value to influence another in the discharge of his duties, or to incline him to act contrary to known rules of honesty and integrity, to pervert his judgment or corrupt his actions by some gift or promise. In that case, the payment is voluntary.

On the other hand, the obtaining or attempting to obtain money, or other valuable considerations by the use, force, violence or coercion, connotes an involuntary payment. To make such a payment involuntary, there must be some actual or threatened exercise of power possessed or believed to be possessed **(here the power to call a strike or to close theatres or to prevent the exhibition of a moving picture)** by the person acting or receiving the payment over the person or property of the one who makes the payment.

R. 3728. There can be no mistake as to the purpose of

the trial court to apply the Act to a labor official in the use of his power to strike in a local matter. This has the approval of the Circuit Court and is contrary to the law as declared in this court.

The distinction between the two crimes would seem to boil down to this—bribery connotes a voluntary payment; extortion a forced or coerced payment.

In determining here whether or not the money paid **by the motion picture industry or some part thereof** was paid as the result of fear, or was paid as a bribe, you, of course, will take into consideration all of the facts and circumstances proven in the case, the manner in which the payments were demanded, promised or made, the concealment, if any, that was resorted to in the books or otherwise, and the action or inaction of all the parties with reference thereto, and the reason which was behind the demand or the threat or the payment.

R. 3729. There can be no doubt that the court regarded the exhibition as a part of the industry, and a part which engaged in interstate commerce.

If you have a reasonable doubt whether the money paid by the persons named in the indictment as victims were paid as bribes, or as the result of extortion, that is, involuntarily, you are instructed that you must not consider such evidence as having any tendency whatsoever to prove the existence of the conspiracy pleaded in the indictment.

But you must not lose sight of the fact that the crime charged is a conspiracy to extort. And I have defined what conspiracy means—an agreement entered into knowingly by the defendants. If they did so conspire in the

manner I have charged, they can be found guilty of the crime charged, and it does not make any difference whether bribes were also accepted or whether they also conspired to accept bribes. In other words, if they did conspire to extort, and that has been proven by the evidence beyond a reasonable doubt, they may be found guilty under this indictment, no matter what else they did. The evidence, therefore, of the manner in which the money was obtained from the motion picture industry has value as some proof of what they agreed to do. It has been said, and I think it good common sense, that sometimes the best way to prove what has been agreed upon is to see and learn what the parties to the alleged agreement did under it. So the manner in which the money was obtained here may well be considered by you as indicative of what the agreement was, what they or any of them, if any, conspired to do.

If there is proof beyond a reasonable doubt that any of the money obtained from the motion picture industry was obtained by extortion, no matter how much or how little, no matter whether from one or more of the motion picture companies, and that money was obtained as a result of a conspiracy among the defendants to extort the same, the crime charged is proven and the defendants, or such of them who you may find were parties knowingly and intentionally to that conspiracy and acted in furtherance of it, may and should be found guilty.

R. 3730. Here again the court regarded the industry as a unity.

If you find that the evidence does not sustain the charge beyond a reasonable doubt, they or such of the defendants as you may find have not been so proven, must be acquitted.

One act of extortion in the manner I have described would be sufficient proof of guilt, assuming, of course that you find there was a conspiracy.

R. 3730. The "manner described" includes Barger who operated a burlesque theater and did nothing but a local business. The "manner described" also ignored the exception in the Act.

And if you find that some of the money obtained by the defendants was bribe money, and other money was extorted as a result of such a conspiracy to extort, the fact that both crimes were committed would not acquit the defendants, or such of them whom you may find were participants in the conspiracy, and acted in furtherance of it, of guilt under the indictment now before you.

As I told you before, I had intended reviewing the facts generally, but inasmuch as three days have been consumed by counsel in a careful and detailed argument of them, I feel that a further discussion would be much too lengthy and do little more than repeat what you have already been told, and what you doubtless remember anyway. Should occasion require, in your discussion in the jury room, you may have portions of the record read to you.

As I have said, all questions of fact are for your decision and they are left with you for that purpose.

For the same reason I will not discuss the contentions of any party.

All of these matters have so recently been reviewed that I hesitate longer to trespass upon your patience. I feel, however, that there should be a short discussion of the facts with reference to the defense of the statute

of limitations which has been raised here by the defendants.

The law provides that no person shall be prosecuted, tried and punished for the offense charged in this indictment, unless the indictment is found within three years after such offense shall have been committed. The three year limitation as it relates to a case like the present, which is one involving an alleged continuous conspiracy, does not commence to run until the conspiracy has been completed by its successful conclusion, by abandonment, or as to some particular defendant by his withdrawal from the conspiracy. **The reason seems to be that if the conspiracy may continue, it would seem necessary to follow that the relation of the conspirators to it must continue. If each conspirator was the agent of the others at the time the conspiracy was brought to life, or if he subsequently became a party to the conspiracy and acted in furtherance of it during its lifetime, he would remain an agent during all of the time that the conspiracy continued.**

R. 3731. This left absolutely no room for anyone to ever withdraw, or to quit.

A conspiracy, of course, is not completed when the agreement is made.

This should have been left for the jury to decide. The mere conclusion of the pleader that here we have a continuing conspiracy should not suffice. The jury might have reasonably concluded from Bioff's testimony, that he made a new deal each year.

Necessarily, a conspiracy such as is charged here, contemplates further acts or that the results of a successful conspiracy endure to a much later date. So the three

year statute of limitations does not become effective until the conspiracy has ended. Such an agreement which is declared by statute to be unlawful may be likened to a partnership agreement. Under such a situation the partnership does not begin and end with the making of the agreement, but continues either to a definite date mentioned in the agreement or until the partners have agreed to terminate it or have disagreed. So a conspiracy agreement such as the one here in question, which it is alleged, involving the obtaining of money from the moving picture industry, continues until it is abandoned or is terminated. This situation would apply to the contention made by any or all of the defendants upon this particular subject.

R. 3731, 32. This is an argument for the prosecution. It was not "necessarily" a conspiracy of such nature. That should have been a question for jury. Under this rule there could be no statute of limitations as to anyone.

Contention is also made in behalf of the defendants Maritote, Rosselli and Kaufman, that the evidence shows, if any of them can be said to have been a party to the conspiracy charged, that he withdrew from it or ceased his connection with it more than three years before the indictment was found on March 18, 1943.

Whether or not any of the defendants that I have named withdrew from this particular conspiracy prior to March 18, 1940, which is three years before the indictment was found, is a question for your determination upon the evidence. **If it is once shown that each of these defendants was a member of the conspiracy, his continued connection therewith until it was ended may be presumed by the jury. Such defendant must overcome that infer-**

ence. He may do so by proving that he ceased to participate, or he may prove that he has publicly disavowed any further connection with the conspirators. Even in the face of such proof, you may still find that his participation did not end. It has been aptly said by a capable judge, that assuming that several men entered into a conspiracy and one becomes disgusted with its progress, or because of the failure of benefits, or for any other reason, and desires to withdraw, the law says he may withdraw but that does not mean that he can stand idly by and become a kind of neutral observer. He must take some affirmative step which is inconsistent with his former participation. He must do something to arrest the progress of the conspiracy in which he has participated in order that the partnership, into which he entered and from which he claims to have withdrawn, can no longer constitute an agency of which he is a part. Having joined in the unlawful scheme, having constituted agents for its performance, the scheme and agency to be continuous until full fruition can be secured, until such defendant claiming to have withdrawn does some act to disavow or defeat the purpose, he is in no position to claim a withdrawal or the delay of the law; as the offense has not been terminated or accomplished, he is still offending. As he has started, or assisted in starting, or assisted in the continuation of evil forces into action, he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw he is still offending.

R. 3732, 33. This is contrary to the rule which should have been applied here as in Buhler v. *U. S., 33 Fed. (2) 399, holding that the withdrawal could be shown by circumstances.*

The question then presented here for your determination upon this branch of the case is whether or not there is any proof that either of the defendants has by any act, statement or otherwise done something affirmative to disavow his connection with the conspiracy, or to defeat its purpose.

If the proof shows that he has by his conduct done something inconsistent with his continuing adherence more than three years before the 18th day of March, 1943, then you must acquit him. If there is no such proof upon this subject of the case, your decision must be against him.

R. 3733. This requires affirmative conduct and eliminates the reasonable inference to be drawn from the evidence that some of the minor characters just quit. For instance, certain persons allowed themselves to be used as dummies on the payroll. Would the law require them to do more than they did after they were fired?

You will perceive that the deadline under this three years statute was March 18, 1940, that being three years before the finding of the indictment in which we are interested. If you find that a conspiracy existed, and it ended before March 18, 1940, or if you find that nothing was done under it after March 18, 1940, then, of course, you must acquit all of the defendants. If, on the contrary, however, you find that the conspiracy continued after March 18, 1940, and acts were done or proceedings were had which were contemplated by the conspiracy as originally entered into, then the defendants would have no defense under this statute.

R. 3733. Applied to this case along with the other instructions, this means that the originators could meet in

Riverside and draw up an agreement of which others were ignorant concerning its full extent, and if the originators kept on going, no one who was ever in the conspiracy could get out or be benefited by the statute of limitations.

Now, the government claims that there is no evidence that any defendant actively withdrew from the conspiracy. It contends that there is ample proof in the evidence that the conspiracy continued at least until May of 1942, and that the acts which were done in furtherance of the conspiracy, as shown by the proof, amply bear out its contention. In other words, it contends that a number of things were done after March 18, 1940, namely, that Bioff collected $10,000 from Coston on March 21, 1940, that Circella collected $11,000 from Coston on December 20, 1940, that Kaufman collected $2500 from Jacocks on August 15, 1940, that the payments to Rosselli continued until May, 1941; that George Browne delivered five-sixths of $28,000 to the defendant Paul DeLucia in the summer of 1940; that the defendant Compagna told Bioff in the Bridewell Prison while he was incarcerated there in 1940 that if he attempted to resign he would do so feet first; that D'Andrea received payments from Barger until May 7, 1942; that in the fall of 1942 D'Andrea demanded $2,000 plus $600 a month from Barger; that John P. Smith paid the defendant DeLucia as late as March, 1942; and some other matters to which the government counsel called your attention during his summation.

R. 3733, 34. Here the court adopted the argument made by the prosecutor and failed to consider that said in defense. The court might just as well have told the jury that if Bioff did anything within three years, no defendant could claim the benefit of the statute.

On the part of the defendant Maritote, my recollection of his contention is that he did nothing, received nothing, and had no part in the transactions after some time, long before three years prior to March 18, 1943. And as to the defendants Rosselli and Kaufman, both contend, of course, that they had no part in this conspiracy at all, and they both said that their actions were such as to be inconsistent with any joining or any part in the conspiracy long prior to these three years that I have already mentioned to you. You will consider all the evidence upon that subject and make your determination upon this particular question as you think it should be made.

And finally, we do not have to decide whether the strikes were called legally or illegally; or whether Browne had the right, without a vote to call one. There is no dispute in the evidence that he did so, legally or illegally, to the injury of the motion picture industry. With this situation in mind you will judge the nature of the transactions which followed and the probable or improbable effect upon those whose duty it was to conduct the motion picture industry.

R. 3734, 35. Here the court makes it clear again that the exception does not apply, and that he regarded the motion picture industry as a unity.

We do not have to decide whether the condition of the laboring man was benefited by these disputes or what transpired. The question for our decision is whether or not a crime has been committed in the respects in which I have already charged you.

R. 3735. The undisputed evidence was that the condition of the laboring man was benefited. "What transpired" should have had some value as evidence of the objectives

of the labor leaders. Here the state of mind of the victims was made, the only test. Everything else was excluded.

After all that has been said, there may be danger that you will be sidetracked by a lot of immaterial issues, by the effort to determine many of the things that have been suggested to you.

R. 3735. Among the issues clearly shown to have been regarded as immaterial by the court were those created by the exception in the Act itself and interstate commerce.

It will lighten your duties materially if you have in mind what these men have been indicted for, and whether the charges in that indictment have been sustained by evidence which convinces you beyond a reasonable doubt.

There is a simple question here. Was there a conspiracy between Bioff, Browne, Circella, and the defendants, or some of them, to extort or attempt to extort money from the motion picture industry? If there was not, the defendants cannot be convicted. If there was, and it continued after March 18, 1940, such of the defendants as were parties to that conspiracy and acted in furtherance of its objects are guilty and should be so found.

R. 3735. The question was a simple one only after the court eliminated a "lot of immaterial issues". Here again the "motion picture industry" is considered as the victim.

You will consider each defendant separately and render a separate verdict as to each. It is important that you agree upon the verdict. The case has taken a lot of time and in justice to all of the parties concerned, should be now completed.

I might say in conclusion, we are not here to teach any-

one a lesson, nor to decide the perennial dispute between capital and labor, nor to seek to remedy matters and things in either category that we may think need remedying. We are not interested in the future but only in the present. We are here to determine whether or not a crime has been committed. In that determination we should not be persuaded to run up side alleys as teachers, reformers, protestants, critics, partisans, sympathizers or philanthropists. We may properly leave to other tribunals or bodies what should be done to remedy the extraordinary and astounding transactions which have been revealed here. We should keep our feet solidly on the ground and determine whether, under the evidence given in this courtroom, these defendants, all or some of them, are innocent or guilty. If we do that, honestly and fairly, without sympathy or prejudice or bias, we will have complied with our oaths.

END OF CHARGE OF THE COURT.

Preliminary Request to Charge.

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2. The Court instructs the jury that you and you alone are the sole judges of the facts in this case, and it is your duty under your oaths, as jurors, to keep unto yourselves, and each of you, as jurors, this duty in arriving at your verdict in this case, and you are not to be influenced in this case, so far as the facts are concerned, by anything except the evidence and circumstances appearing in the course of the trial. The Court particularly cautions you that anything said by the Court in its instructions is said to you for the purpose only of giving you instructions as to the law in the case. If you should be under the impression, after hearing these instructions of the Court as to the law, that the Court has indicated the weight or purport of certain facts in evidence in this case, then you are not under any duty to follow the impression thus conveyed and need pay no attention thereto, unless it agrees with your own judgment from the evidence as to the facts in this case. (Charged in substance.)

24. Each defendant on trial in this case is presumed to be innocent of the crime with which he is charged. This presumption of innocence has the weight and effect of evidence in his behalf. It is your duty to approach the consideration of each fact and circumstance in evidence with that presumption in mind. It continues to operate in favor of the defendant until and unless it is overcome by such a weight of competent evidence that you are left without a reasonable doubt of his guilt. The presumption of innocence attends each defendant throughout the trial,

and throughout your deliberations after the case has been submitted to you, until you actually arrive at and agree upon a verdict. In determining your verdict you are to keep in mind that the Government at all times has the burden of overcoming this presumption by evidence, and unless it has been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond a reasonable doubt, your verdict should be not guilty. This presumption of innocence outweighs and overbalances all conjectures, innuendoes, suspicions and suppositions, and can only be overcome by proof beyond a reasonable doubt. (Charged in substance.)

41. A conspiracy cannot be established by mere suspicion, and evidence of mere relationship between the parties or association does not establish the fact of conspiracy. It is equally well established that the mere knowledge, acquiescence or approval of an act without cooperation, or agreement to cooperate, is not enough to constitute one party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design or purpose. (Charged in substance.)

42. The Court instructs the jury that before the acts and declarations of an alleged co-conspirator may be considered in evidence against a defendant, the jury must find that a conspiracy existed; secondly, that the defendant was at the time of the acts and declarations a member of said conspiracy, and third, that the alleged

co-conspirator whose acts and statements were given in evidence was a member of said conspiracy, and fourth, that such acts and statements were in furtherance of the conspiracy charged.

Mere knowledge or approval of, or acquiescence in the object and purpose of a conspiracy without agreement to cooperation to accomplish such object or purpose, as already explained, is not enough to constitute one a party to the conspiracy.

One cannot be held as a member of a conspiracy upon proof merely that he has knowledge of, or negatively acquiesced in, the crime that was about to be committed; but in order to fasten guilt upon one accused of being a co-conspirator, it is necessary to prove that he actively participated in the conspiracy charged. (Charged in substance.)

44. The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. (No.)

Additional Requests to Charge.

51. The Court instructs you, as a matter of law, that the only offense before you for consideration is the offense alleged in the indictment. The indictment charges that the defendants named in the indictment, together with George E. Browne, William Bioff and Nick Circella, and other persons unknown to the Grand Jurors, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other "to obtain and attempt to obtain by use of and attempt to use and threat to use force, violence and coercion, the payment of money," and "other valuable considerations from a group of corporations, including Loew's, Inc., Paramount Pictures, Inc. and other firms, persons and corporations whose names are to the Grand Jurors unknown", and to obtain the payment of said money and said "other valuable considerations," the same being the moneys and property of said firms, persons and corporations, with the consent of the said firms, persons and corporations induced by wrongful use of force and fear, "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce.

Now, the Court instructs you that the first fundamental question that you should determine beyond a reasonable doubt with respect to the charge is: Was, in fact, a conspiracy formed as charged in the indictment? If you answer the question in the negative, you are at the end of the question and your verdict as to all defendants should be not guilty. If, on the other hand, you answer the question in the affirmative, you should then determine separately as to each defendant, the question whether

you have been satisfied beyond a reasonable doubt that such individual defendant did actively and consciously enter into such conspiracy as charged in the indictment. If you have a reasonable doubt whether he did so join, you must find him not guilty. (Charged in substance.)

52. You are further instructed that the indictment charges that the conspiracy which I have hereinabove described to you charges that the same was "in connection and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce"; you are instructed that this allegation is a material allegation and must be established beyond a reasonable doubt from the evidence. You are further instructed that even though you believe from the evidence, beyond a reasonable doubt, that a conspiracy has been established as I have hereinabove described, you must nevertheless acquit the defendants unless you further believe beyond a reasonable doubt that said conspiracy was in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce. (Charged in substance.)

53A. In order that the Government may be said to have sustained its burden of proof as to any defendant, it must prove beyond a reasonable doubt that such defendant entered into the conspiracy and knew that the purpose of the conspiracy was to affect interstate commerce and not merely the exhibition of motion pictures. (Charged.)

Additional Requests to Charge.

53B. Unless you have been satisfied by proof beyond a reasonable doubt that the defendants entered into a conspiracy specifically to create fear by interference or threatened interference with the production and distribution of motion pictures, you must acquit the defendants. It is not sufficient if you find that there was a conspiracy, that such conspiracy contemplated the creation of fear with relation to interference with only the exhibition of motion pictures. If you believe that the defendants conspired to cause fear on the part of the alleged victims, but that such fear had to do only with the interference with the exhibition of motion pictures then you must find the defendants not guilty. (Same as 53A.)

62. A conspiracy to make money by any means whether lawful or unlawful is not the specific offense which is charged in this indictment and proof of such a conspiracy will not establish the specific charge laid in the indictment and will not be sufficient to support a verdict of guilty. (Same in substance as 59.)

63. The indictment does not charge a general conspiracy to make or obtain money from any source and without regard to the method or means employed in obtaining it, but it does charge a specific conspiracy to obtain or attempt to obtain money or things of value from certain named firms in the motion picture industry and others stated to be unknown, through unlawful acts or attempted acts of coercion. Therefore if you find that the sole conspiracy which was entered into or which existed among the defendants was a conspiracy to obtain control of the IATSE and to use such control for the

purpose of making or obtaining money by any method or means, without specifying the particular method or means, the Government has failed to sustain its burden and you would have to acquit the defendants. (Same as 59 in substance.)

70. The indictment charges a conspiracy formed within the Southern District of New York, and unless you find beyond a reasonable doubt that the specific agreement was actually entered into by these defendants within the Southern District of New York, the Government has failed to sustain its burden of proof under this indictment and the defendants must be acquitted. You are instructed that if you find that a conspiracy was in fact entered into in Chicago, Illinois, or in Riverside, a suburb of Chicago, and that all of the acts and conduct of the defendants related back and had their inception in such a conspiracy, then you must find the defendants not guilty. (No.)

71. The indictment charges a conspiracy formed and entered into within the Southern District of New York. Therefore, if you find that the proof admits only of a conspiracy existing among the defendants, or some of them, which had its beginning and was first entered into some place outside of the Southern District of New York, and that everything that was done by any of the parties thereto, within the Southern District of New York was in pursuance of and to effect the objective of the conspiracy which began and was formed some place outside of the Southern District of New York, the Government has failed to sustain its burden of proof under this indictment, and you must acquit the defendants. (No.)

Additional Requests to Charge.

72. Even if you find beyond a reasonable doubt that the conspiracy alleged in the indictment was entered into, it cannot be said as to any defendant to have been continued as to him unless you can find in the evidence an act in pursuance of said conspiracy which he committed or which was committed with his full knowledge and consent within three years prior to the filing of the indictment herein, and if you fail to find proof beyond a reasonable doubt of the commission of such an act within three years prior to the filing of this indictment, then he must be acquitted. (No.)

73. You are instructed that even if you find that the Government has proven beyond a reasonable doubt that a defendant was a member of this conspiracy at some time, that defendant must be acquitted if you also find that at some time prior to March 18, 1940, he withdrew from the conspiracy. That withdrawal from the conspiracy may be shown by conduct inconsistent with the theory of continuing adherence, and so, if the evidence has left you with a reasonable doubt whether such a defendant continued to adhere and be a party to this conspiracy, if you have found that there was such a conspiracy, after March 18, 1940, then you must find that defendant not guilty. (Charged in substance.)

4. That for any acts of violence, or threats of violence, or other illegal acts which may have been proven at this trial, other than is involved in the carrying out of any conspiracy charged in the indictment herein, the person committing the same can only be prosecuted under the statutes, Federal or State, covering the commission of

such acts. None of the defendants are on trial herein for the commission of any such acts as such, and if the jury should come to the conclusion that the evidence establishes the commission of such illegal acts by any defendant herein, it may not be considered the same against any other defendant, nor against the defendant involved except insofar as it may bear upon the question of his participation in any conspiracy charge in the indictment, if such conspiracy has been established, or insofar as it may be evidence of the existence of such a conspiracy. (No.)

9. The requirements of the law are not satisfied by proof that the defendants received money, either directly or indirectly, from the corporations specifically named in the indictment. Mere proof of the receipt of money is not sufficient to warrant the conviction of the defendants. It is the law, and I so charge you that you must acquit the defendants unless you find beyond a reasonable doubt that the corporations named in the indictment paid money to the alleged conspirators by virtue of force and fear and that the defendants received the money in pursuance of a conspiracy to obtain money and other valuable considerations by the use and attempt to use force, violence and coercion from the corporations named in the indictment. (No.)

16. If you have a reasonable doubt as to whether the payments made to the defendants, that is provided that you find they were made, were made for the purpose of influencing Bioff and Browne, who were representatives of a labor organization, in respect to any of their acts,

decisions or other duties as such representatives, or to induce them to prevent or cause a strike, it is your duty to acquit the defendants. (No.)

18. I charge you that the question of the existence of the conspiracy as charged in the indictment, must be found by each of you as an independent fact. (Charged.)

20. I charge you that it is your duty to acquit the defendants unless you are convinced beyond a reasonable doubt that they conspired to interfere with interstate commerce. I further charge you that you must acquit unless you are convinced beyond a reasonable doubt that the interference was direct and substantial. (No.)

22. I charge you that Browne and Bioff, according to their testimony, are accomplices of the defendants. This does not mean that you are to conclude that the defendants confederated and conspired with Bioff and Browne. It merely means that in considering the testimony of Bioff and Browne you must bear in mind the fact that they admitted they were the accomplices of the defendants and that you must consider their testimony in that light. Although the law does not ordinarily require that the testimony of accomplices be corroborated, I charge you that you may not convict the defendants upon the testimony of Bioff and Browne unless they be corroborated by such other evidence as tends to connect the defendants with the commission of the crime. The evidence required is insufficient if it tends only to establish the credibility of Bioff and Browne. The corroborative evidence, to have any value, must be evidence from

an independent source of some material fact tending to show that the defendants were implicated in the crime. The independent evidence must be material evidence other than that of Bioff and Browne, and must fairly and reasonably tend to connect the defendants with the crime charged. It may not depend for its weight and probative value upon the testimony of the accomplices. It need not alone and by itself establish that the defendants committed the crime. But where the corroborative evidence standing alone has no real tendency to connect the defendants with the commission of the crime, it is insufficient, and therefore you must acquit the defendants. (No.)

Supplemental to General Request to Charge.

The defendant Louis Kaufman respectfully requests the Court to charge as follows:

II. In the order in which the testimony was offered, the first item touching Kaufman has to do with the conversations at the house in Riverside, Illinois, some time in May, 1934, shortly before the convention of the IATSE which was held in Louisville, Kentucky, the first week in June, 1934. Bioff testified that in connection with talk of New Jersey, Kaufman's name was mentioned. Browne, on the other hand, testified that he did not recall any mention at all of New Jersey. In any event, you must completely disregard Bioff's testimony about that, and you must not permit it to have the slightest weight in your deliberations, in determining whether Kaufman has been connected with this conspiracy. Kaufman was not present at the meeting in the Riverside house; there was not a scintilla of evidence that he was associated with anyone who was there, or that he authorized anyone to speak for him there; there is not a scintilla of evidence that anything that was said there was communicated to him or approved by him. It is the law that any conversation which was had in his absence and without his knowledge and approval, at a time when he was not shown to be a member of the conspiracy charged in the indictment, cannot be considered as having any probative value whatever to connect him with the conspiracy. It is your sworn duty to erase that testimony from your mind, and you must not permit it in any way

to color your consideration of the question, in deciding whether Kaufman has been connected with the conspiracy. (No.)

III. The next item of testimony touching Kaufman has to do with the alleged delivery to him on October 27, 1936 of $15,000 by Jacocks, Morgenroth and Flaherty, who at that time were employed in the Newark office of Warner Bros. (No.)

You will bear in mind that there has been no testimony whatsoever that Kaufman demanded or even asked for this money. It has been affirmatively shown that Kaufman never threatened to strike, nor did he make any threats of any kind. Furthermore, there is no proof to show that said moneys were paid involuntarily by Warner Bros. or as the result of any fear or coercion. Of the witnesses whose testimony touched this payment, Flaherty said only that he had put the case in various theatre safes for safe-keeping overnight from October 27 when it was brought over to Newark to October 28 when it was turned over to Kaufman. Jacocks and Morgenroth testified that on one occasion Kaufman had said he had to take the money "over the river' and at another time he said he had "given the money to Bioff."

Bioff, however, testified that he never received any of this money and had had no money dealings whatsoever with Kaufman. He flatly declared that Kaufman was never his partner. (No.)

IV. The mere fact that Kaufman may have received $15,000.00 under the circumstances indicated by the testimony with respect to this incident does not of itself

establish that he knew of the existence of the alleged conspiracy and intentionally and knowingly participated therein. (No.)

X. On the other hand, if you believe the testimony offered by the Government concerning the payment of $2500.00 in 1939 and $2500.00 in 1940 you must also consider this further specific point in respect to Kaufman. Even if you had concluded that the evidence showed beyond a reasonable doubt that Kaufman was connected with the conspiracy when he received the $15,000.00 payment on or about October 28, 1936, if his actions in 1939 and 1940 were directed to the obtaining of money for himself, independently of the conspiracy, you must consider whether this conduct on his part was inconsistent with his continuing adherence to the alleged conspiracy. If you find that what he said and did in 1939 as testified to by Jacocks and Morgenroth was inconsistent with continuing adherence on his part to the alleged conspiracy, amounting to a withdrawal from the conspiracy, then you must return a verdict of not guilty as to Kaufman because it would then appear that he had withdrawn from the conspiracy more than three years prior to the filing of this indictment and prosecution of him would therefore be barred by the statute of limitations. (Leave to the jury under the law as I have charged.)

XI. There has been testimony here that at a meeting of the members of Local 244 on January 13, 1942, Kaufman is alleged to have stated to those present substantially as follows: "There are some people who would like to see me in jail, but I am not going to jail. I will be here long after they are dead, and they won't die a

natural death." The uncontradicted proof is that whatever was said by Kaufman at that meeting was with respect to a matter entirely foreign to this prosecution, and had no reference whatsoever to anything involved in this case. You must therefore entirely disregard the testimony concerning any such statement by Kaufman as having any tendency whatsoever to establish his alleged connection with this alleged conspiracy. (No.)

XIV. There has been mention in the testimony of an individual named Zwillman. It affirmatively appears from the proof that the name and identity of Zwillman was known to the Grand Jury which returned this indictment, and that all that was testified to at this trial in respect of Zwillman was also known to the Grand Jury at the time of the finding and presentation of this indictment. Therefore, as a matter of law, you cannot consider that Zwillman was connected with this conspiracy, and it is no part of the charge against Kaufman that he did anything at all in relation to or in connection with Zwillman, and you must not consider any such alleged acts as in any way connecting Kaufman with the charge laid against him by this indictment. (No.)

Supplemental Request on Behalf of Kaufman.

The argument of the prosecution that a defendant should be convicted, because it might afford the means for the prosecution of others, or justify the continuance of the Special Assistant Attorney General in office, is highly improper and must be entirely disregarded by you, in your deliberations.

Supplemental Requests to Charge on Behalf of Defendant John Rosselli.

Supplemental Requests of Defendant John Rosselli.

1. You are instructed that you must find the defendant, John Rosselli, not guilty unless you find, beyond a reasonable doubt, that the evidence establishes a conspiracy, as charged in the indictment, existed within a period of three years prior to the return of the indictment herein, to wit: March 13th, 1943, and that he knowingly and intentionally was a party to such conspiracy. (Charged as to all defendants.)

3. Testimony has been given that the defendant, John Rosselli, received some of the proceeds of certain IATSE weekly salary checks from September, 1936, to November, 1937. You are instructed that you may not consider this testimony in determining whether or not said defendant was a party to the conspiracy charged in the indictment. Said testimony may only be considered by you, if you believe, beyond a reasonable doubt, that said defendant did so receive the proceeds of said weekly checks, as showing association with the alleged confederate Bioff and persons in an official capacity with said labor union, and in connection with the allegation that it was the purpose of the defendants and their confederates to dominate and control said labor union. (No.)

OPINION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR.

Our comments have been interspersed in bold face type.

L. HAND, *Circuit Judge:*

Compagna and six others have appealed from convictions for violation of subdivision (d) of § 420(a), Title 18, U. S. Code:

The indictment alleges that the conspiracy was in violation of (a), (b) and (d). (d) refers to (a) and (b) so it would be more accurate if the Circuit Court had either followed the indictment or have described the charge as a conspiracy to violate the Act.

a conspiracy to extort money from producers and exhibitors of moving pictures during the years 1935 to 1940. They rely upon some twenty assignments of error, of which the first and the most important is that there was not enough evidence to support the verdict.

The Circuit Court put this first, we did not. This is a misstatement of our position. We never did regard any such claim as first and most important. (Petition for Rehearing, Point Sixteen, R. 4206, fol. 4207.)

Since the case against Kaufman is somewhat different from that against the rest, we will reserve consideration of his appeal until we have disposed of those of the others.

Kaufman was and is separately represented, so we do not comment on the case as it concerns him alone.

The only other alleged errors of any consequence concern the general conduct of the trial: e.g., the admission of supposedly incompetent evidence, the judge's charge, the prose-

cutor's misconduct, and the fact that the judge spoke to the jury out of court after they had retired.

These errors should have required reversal. That which we regarded as one of the most important is here omitted, i. e., variance as to venue. (Petition for Rehearing, R. 4213, fol. 4215.)

For a discussion of the constitutionality of the statute—also an assigned error—we need only refer to *Nick* v. *United States*, 122 Fed. (2) 660 (C. C. A. 8).

The Statute was discussed and held to be constitutional in United States v. Local 807, 315 U. S. 521. The Circuit Court studiously avoids all mention of this case although it arose in the second circuit. Our case is not like the Nick case or the Teamsters case, but insofar as they conflict, and they do conflict, the Teamsters case should control. The Circuit Court declines to state our objection to the constitutionality of the statute for the reason that it prefers the authority of the Nick case to the applicable decisions of this court. If our point were stated it would then be obvious that the Circuit Court in the case at bar has construed the statute in a way to affirm this judgment which would require the further holding that the Act is not within the power of Congress. We object to a literal use of the words in the Act as to interstate commerce which makes the Act reach a strike on a moving picture theater.

To an intelligent understanding of the appeal, it is necessary to give an outline of the general venture in which the accused were involved, as the jury might have found it from the testimony. The fabric of this was woven out of the testimony of two accomplices—Bioff and Browne; particularly that of Bioff, a man with a long, discreditable and criminal past, confessedly guilty of perjury in an earlier examination of the same transactions here in question. Their

story was in substance as follows. Browne had been a member and business agent for the Chicago local of an international trade union of stage hands and moving picture machine operators, which covered the United States and Canada. In 1932 he ran for president of the union and was defeated. Shortly thereafter he met Bioff, who already knew the accused and others of their kind and had engaged in illicit operations with them. The record does not definitely disclose the nature of the original association of these two men, but a jury might find it too to have been illicit.

If there is anything definite and complete in the record, it is a narration in every detail of the original association of Bioff and Browne. How they met, what they did at first and how their association grew (R. 100 to 944, Vol. I, R. 1014 to 1326, Vol. II). A correct understanding of the undisputed facts about this original relationship, before it is claimed your petitions were involved, would have been helpful to the defense. Particularly in demonstrating that Barger's troubles had no place in this record.

In any event, they made more money than they had been used to having and spent it freely enough to attract the attention of one, Circella, who kept a night club in Chicago, and who was one of a group or gang, of confederates who lived by blackmail.

There is not the slightest foundation in the record upon which to find that Circella was one of a blackmail gang. Circella is named in this indictment and was convicted with Bioff and Browne. How Circella lived is not shown, except that the prosecutor, without proper proof, designated Circella and denounced your petitioners as members of the Capone gang. It is notorious that Capone was a bootlegger. Membership in his gang was an easy matter to charge, but not so easy to prove.

The cupidity of these men became aroused by this news;

and, after preliminaries unnecessary to detail, they forced upon Browne and Bioff an agreement by which they should receive, first one half and, later two thirds of all that the two might collect from moving picture exhibitors.

It would be more accurate to say that Rio told Bioff of their demands for a share in any money he made, no matter how he made it. Exhibitors were not discussed when the partnership was formed. The object of the agreement was proved by what Bioff and Browne did to get the money. Among other things they took a large part of the union treasury and turned over a share. Undisputed evidence, contrary to the theory of the prosecution, was ignored in both courts below.

Among the confederates were, not only the appellants here, but a number of others—among them, Circella, already mentioned. The first step was to elect Browne president of the union, in which they succeeded.

Browne had no opposition and there is no proof that the defendants had anything to do with his success. The Circuit Court adopts this premise from the opening statement, comments and argument of the prosecutor which furnishes the only basis for the finding. The importance of correcting such a misstatement is that the prosecutor first made this inference without basis then he built another inference upon that, and so on. In a case based upon circumstantial evidence, it is important to note that the prosecutor not only failed to prove his first step but that the uncontradicted evidence is contrary to his position.

Circella and Bioff were then given offices in the union as personal representatives of Browne, as president, and both drew salaries. Early in 1935 all had been arranged, and Bioff and Browne, who were to be the spearheads, began to blackmail exhibitors of moving pictures in Chicago.

The uncontradicted evidence shows that Malloy, who

preceded Browne in power, was accepting money from the exhibitors for years in return for his betrayal of the union. This was the two men in a booth labor controversy. Your petitioners had nothing to do with this, neither did Bioff or Browne. After the death of Malloy, Browne as International President took control of the Chicago union under the by-laws. Bioff and Browne merely continued the arrangement made by Malloy. The exhibitors paid money in preference to hiring more men. It is important that the undisputed evidence be correctly understood here and that it not be misstated.

So far as appears, they did not expressly threaten violence, but confined themselves to a pretence of union activities; that is, they threatened to call strikes against their victims unless they were plentifully paid. Among their earliest victims was an exhibitor in Chicago, one Barger, who operated a small theatre, and whom Bioff forced to share equally with him all Barger's profits.

Barger formed a partnership with Browne long before the defendants were heard of, whereby Browne used the union to help Barger stifle competition. This appears from his own testimony (R. 2110-2196, Vol. III). Then it appears that he was arrested for indecent shows and sought the influence of politicians. He said that he merely contributed to local politicians as a matter of policy. The Circuit Court weaves Barger in as if he were connected with the charge made in the indictment. The original pressure on Barger came from Browne who was an official of the stagehands union. This was before Browne met Bioff. Barger paid Browne in return for Browne's agreement to require competitors to use more stagehands.

Later, by the same pressure, Bioff imposed upon this unfortunate man as employees: first, Maritote, and later, D'Andrea, neither of whom rendered any services what-

ever, but who were paid $175 a week and later $200. By the autumn of 1935 the enterprise had apparently become so profitable that Bioff extended it to New York. One, Basson, was the local agent of the New York local, and had undertaken negotiations for a wage increase with some large exhibitors in that city, with the threat of a strike as a sanction; but Bioff, speaking for Browne, without whose consent no strike was regular, intervened and upon the payment of $150,000 from the exhibitors collectively, refused to permit the strike.

This misleading statement of conclusions will help to demonstrate the vice of the state of mind testimony. It is just as reasonable to find from the undisputed testimony that Basson was afraid of a strike, whether it was legally called or illegally called. He could have acceded to the demands of the union and had no fear and no strike. This was a legitimate wage demand by Basson of a legitimate union. How could the courts below say that the exception in the Act could be properly ignored? It is fair to say that the employers found it cheaper to pay the $150,000 than to meet the union demands for a wage increase.

We contend that it was a question for the jury to determine, from all of the facts and circumstances in evidence, why Basson paid; if he had any fear at all, or was coerced at all. The jury should not have considered what Basson said he had on his mind, years after the event.

Until the beginning of 1936, the collections had all been from exhibitors, either in Chicago or New York, but early in that year the group decided to include producers, who, as is well known, produce films for the most part in California.

Bioff didn't put this construction on the affair when he made his demand upon Schenck. According to Bioff, he told

Schenck that the big producers had saved a lot of money after the defeat of the union on the west coast, and that they wanted some of that money back. Here again a correct understanding of the undisputed facts will be helpful. The Circuit Court has put the cart before the horse and has found connections which do not exist. The money obtained in Chicago was negligible and obtained without reference to any national hookup. After the IATSE lost the Hollywood strike, they were down to a few members and the moguls ignored the union. Other unions took in their members and Browne was helpless. We quote from the record (209):

> "The Witness Bioff: The accomplishment was that Mr. Otterson asked me to open the theaters on a promise that he would do everything in his power to see to it that the IATSE retained its jurisdiction and they would correct the mistake that they made."

This was followed by a meeting in New York of which Browne reported to Bioff as follows (R. 210):

> "The Witness Bioff: The Report was that we were getting back all of our jurisdiction and that we will have a closed shop there too."

By this maneuver, the union acquired six or seven thousand men (R. 211). No money was requested or paid. The IATSE was taken in under the basic agreement.

If it be correctly understood, from the undisputed facts, that the pressure which produced the large sums of money from the victims named started in this manner, it will be seen clearly that Barger was not in the picture at all.

It had been the custom of the industry to have an annual meeting each year in New York between representatives of the various unions in the industry and of the producers; and in 1936 Bioff went to this meeting and met Schenck, a representative of a large producer. Bioff threatened to close up the theatres of exhibitors throughout the

country unless Schenck could raise a very large sum from the producers generally.

Schenck took pains to explain that he conveyed the message to the other executives and that they were free to pay or have labor trouble.

After some higgling, the two finally agreed upon a schedule, or tariff, by which the larger producers were each to pay annually $50,000; and the smaller, $25,000. The group found the threat of a strike against the theatres more effective a sanction than a strike against the producers themselves; for, by stopping the outlets they could entirely paralyze the production of films.

In the absence of the record, an incorrect impression might be gained here of the undisputed facts. Before Browne discovered that the producers could not stand a strike on the Chicago theaters, he was helpless as to any strike on the producers. They ignored Browne and his puny union. The first thing Browne did after he found them vulnerable to a Chicago strike was to put his men back to work in Hollywood and to build up the union. It was after the IATSE was strengthened that Bioff took advantage of their power, and the fear of labor trouble on the part of the producers to obtain money.

The arrangement so concluded lasted almost until the indictment was filed on March 18, 1943, and resulted in the collection of over $600,000, in addition to nearly $500,000 collected from exhibitors.

The evidence connected all the accused now at bar with this undertaking, although for the most part this was through the testimony of Bioff, corroborated in some degree by Browne. As is so often the case in criminal appeals, we are asked to reverse the conviction because the testimony

on which the verdict was based, was incredible; as always, we reply that that question is not for us, but for the jury.

This is not a correct statement of our position (Petition for Rehearing, R. 4207, fol. 4208). We did our best to prevent this reply which the Circuit Court could be expected to make every time the credibility of witnesses is discussed. The government attorneys know very well that we conceded, for the purpose of our appeal, the truth of every scrap of testimony produced from whatever source. We believed that it was important that we not be sidetracked or have our real points confused.

If, viewing the situation as a whole, they chose to believe Bioff, their conclusion was final. Coming to the individuals separately, nothing need be said about Compagna; Bioff connected him with the venture in the most direct way; apparently he was the chief. To deLucia Bioff repeatedly paid part of the blackmail; and, on occasion, he did the same to Gioe, though not so often. Circella introduced Rosselli to Bioff as the representative of the group in California; Bioff arranged to pay him a part of the money extracted from the producers in that state, though the payments were disguised by bookkeeping designed to hide the nature of the transaction. As we have already said, Maritote and D'Andrea were given sinecures in the business of Barger, at weekly payments of from $175 to $200. It was impossible to doubt—nothing being shown to the contrary—that men, receiving such payments in such a way, were privies to the scheme.

Contrary conclusions are just as reasonable from the undisputed evidence. There was no evidence at all of a direct connection as to any of your petitioners with any act charged in the indictment.

They could not have supposed that they were bona fide employees of Barger; nor is it tenable to assume that a ruth-

less and grasping crew of blackmailers would provide soft berths for subordinates who were ignorant of the general nature of the undertaking of which they were the beneficiaries.

They never supposed they were or claimed that they were employees. Their claim was that Barger sought local police favor and protection by paying them. The Circuit Court assumes that the benefit came from the national conspiracy. It is more reasonable, from the evidence, to hold that D'Andrea knew nothing of the betrayal of the International Union by Bioff. A child in D'Andrea's place would not have accepted checks in payment, if he had possessed any such knowledge. We don't seek to argue details, but we must point to circumstances in the undisputed proof to show that the Barger transaction was foreign to the issue.

We start therefore with the hypothesis that all of the accused now at bar were parties to a blackmailing conspiracy of wide scope, long duration, and vast returns.

"Hypothesis" is not the word for it.

It is apparent that such a conspiracy was within the statute, provided that the threats used to extort the money were "coercion," as defined in subdivision (a) of § 420(a); and provided further that the extortion was "in connection with" an act "affecting" interstate commerce. To take up the second point first, it was enough proof of the effect of their acts upon interstate commerce, that the group found it more effective, when they were blackmailing the producers, to threaten them with a strike against the theatres. Nothing could more completely illustrate the unity of the whole industry; all its parts were like those of a single elastic member in which an impact upon one part is instantly transmitted everywhere. Moreover, not only would the producers feel the check upon the interstate movements of their films

when the exhibitors were tied up; but, since many of the exhibitors did business on a small margin, and must have a constant supply of films to keep going at all, a very short cessation of that supply at the sources might destroy them, and end them forever as outlets. If these were the facts, the business was interstate as matter of law and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue.

But the judge did say something on the issue. He took the side of the government. He decided the issue as a matter of law, and decided it wrong.

Coming back now to the first of the questions we just put, the accused "coerced" exhibitors and producers, if it was "coercion" to threaten them with strikes. The statute does not, indeed, make it a crime to force a rise in wages by such a threat; the twice expressed exception that it shall not apply to the payment of wages would alone prove that, as indeed would the general purpose to be drawn from the whole.

This is correct, but is it not strange that the Teamsters case should not be cited here in view of the fact that your Honors had also put this construction on the Act.

But if the accused at bar were not concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen, but to feather their own nests, they "coerced" their victims within the meaning of the section.

This is one way to regard the evidence, but it is strained. The use of the phrase "accused at bar" denotes a switch of terms. We were talking about the labor leaders who obtained the money and exerted the coercion—they were always concerned in wage disputes. If the "accused at bar" were the only ones discussed there would be no need to con-

sider the exception at all, but they were not in a position to exert pressure, in fact, they had no dealings with the victims at all.

The judge should have left to the jury nothing more than he did.

The judge left nothing to the jury. The Circuit Court never answered the real question, and that was, did the judge have a right to refuse to instruct on the exception and to regard the Act as if the exception had never been enacted? The judge told the jury that strikes, legal or illegal, had nothing to do with the case, and that the condition of the working man, one way or another, did not matter.

The indictment having been filed on March 18, 1943, it was necessary to show that it continued until March 18, 1940, and there was evidence in plenty that it did, although several of the accused were not shown to have continued their connection with it as late as that. To meet this lapse in the evidence as to them, the prosecution invoked the well established doctrine that anyone, once shown to have been a member of a conspiracy which lasts until the beginning of the statutory period, must satisfy the jury by affirmative proof that he disconnected himself from it before that period began. So the judge charged, and he was quite right; we have so lately affirmed such a ruling, that we need only refer to the authorities on which we then relied. *United States* v. *Cohen*, 145 Fed. (2) 82, 90.

We quote from the opinion in United States v. Cohen, 145 Fed. (2) 82, written by Judge Hand:

> "The judge rightly told the jury that a confederate, once shown to have been such, had the burden of satisfying them that he had withdrawn from the enterprise."

Assuming that this is correct as an abstract proposition of

law, the Circuit Court in our case has not correctly stated that which the judge did tell the jury. He told them that no one could possibly ever get out of the conspiracy if the accomplice witness performed any act within three years. This was tantamount to an elimination of the statute of limitations because it was undisputed that Bioff did plenty within three years. The instructions are even worse than this. Please see another appendix here where we have copied them and pointed out the errors (herein p. 61).

We do not find it necessary to discuss the several alleged variances between the indictment and the proof; neither cumulatively, nor in detail, could they have misled the defence;

Whether or not the defense was misled is only part of the question. Constitutional questions of venue are involved, but the Circuit Court does not mention our point. Nor did the Circuit Court heed the manner in which the prosecutor was permitted to purposely mislead the defense.

the substance of the charge and the proof were in entire accord.

This is not true. The conspiracy was alleged to have been formed in New York and the undisputed proof showed that it had been formed in Riverside, Illinois.

All the accused and a number of others were engaged in a single enterprise, understood by all to be such: a common engagement to prey upon the fears of producers and exhibitors wherever there was a likely opening. It is curious that today in the face of §556 of Title 18, U. S. C., it should still be supposed that we would concern ourselves with the trivial challenges to the indictment which are here put forward as a ground for reversal. The same is true of most of the assigned errors, touching the judge's rulings upon evidence and his charge. With one exception which

we shall take up in a moment, these were of no importance; and would not even have been of importance, had the result been less inevitable than it was. We shall not consider the others in detail, but content ourselves merely by referring to § 391 of Title 28, U. S. C.

The U. S. C. was never intended to alter or amend the constitution. Any well informed layman would recognize the importance of the points presented by the record. Your petitioners were entitled to a statement of the constitutional questions involved them, and to an announcement of the legal grounds upon which the judges concluded in favor of the prosecution.

Two questions do arise, however, which seem to us to require an answer. After the jury had been locked up, they sent out a note, asking that Barger's testimony against D'Andrea should be read to them; and the judge, who had apparently left the court room, on his way back to it "stopped in the jury room and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we came back." The testimony was read to them after lunch, not including the cross examination, which they apparently did not want to hear. At any rate, since the accused did not ask to have it read, they are in no position to complain of the omission. As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. *Mattox* v. *United States*, 146 U. S. 140, 150; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81; *Dodge* v. *United States*, 258 Fed. Rep. 300, 303, 304 (C. C. A. 2); *Little* v. *United States*, 73 Fed. (2) 861, 864, 865 (C. C. A. 10). But, like other rules for

the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. *Dodge* v. *United States, supra* (258 Fed. Rep. 300); *Rice* v. *United States,* 35 Fed. (2) 689, 696 (C. C. A. 2); *United States* v. *Graham,* 102 Fed. (2) 436, 444 (C. C. A. 2). There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused.

The Circuit Court could find nothing in the record upon which to base a finding that no prejudice resulted. The correct rule is that in the absence of any showing one way or another, the prejudice will be presumed. Please see our brief for authorities and a review of the cases cited here by the Circuit Court (p. 80).

There remains only one question, as to the method of dealing with which my brothers and I are not in entire accord, though we agree in the result. During the trial the prosecution called a number of exhibitors or producers who testified that Bioff threatened to call strikes in their theatres or film studios, if they would not comply with his demands.

They testified as to what Bioff told them, which was proper and was as far as they should have been permitted to go.

As we have already said, he did not threaten them with violence, but the judge allowed the prosecutor to ask whether, when they paid the blackmail, they had been moved by fear of violence; and in a number of instances they said that they had.

This occurred in every instance. Every victim who took the stand gave the same improper testimony.

Moreover, they were further allowed to say what their fears had been: i.e. that during other strikes there had

been stoppages of film machines in the middle of a performance; stink bombs had been set off in the theatres; members of the audience, and recalcitrant exhibitors had been assaulted. Against all this testimony the accused vigorously protested at the time, and they particularly press its admission upon us now as error.

This improper evidence also included murders, bombings, the danger as to women and children, fears as to their own safety, their financial worries, etc. Petition for Rehearing (R. 4208).

If the indictment had charged the substantive crime of extorting money by "coercion," there would, we all think, have been no doubt of the relevancy of such testimony;

In the Teamsters case, your Honors answered this question of relevancy directly opposite to the answer given in the case at bar. Judges Hand, Clark and Swan in the same case answered the same question contrary to their present position. Yet the same judges do not mention the Teamsters case here. This failure was not an inadvertent oversight. The Teamsters case was again called to the attention of the Circuit Court in our petition for rehearing (R. 4209).

it would have been necessary in that case to prove that the "coercion" had induced the payments, as to which the victims would obviously have been the best source of information.

There is a wide difference between "source of information" and "state of mind."

They would know why they paid the money,

Even this happens to be untrue in some instances, the opinion evidence was given by persons who had nothing to do with the original transaction with Bioff and who had nothing to do with the decision to pay. They were mere errand boys as to the money.

"Why they paid the money" and what they may have had in mind are two different things.

and, the issue once open,

Who, but the trial court, ever held that the issue as to the state of mind of the victims was ever properly opened and by what authority does the Circuit Court say that the issue was open, contrary to the decision of this Court?

no prosecutor should be limited to the bare statement that the threat had been the motive; the victim would be allowed to show in detail just what fears the threat aroused in him. Since, however, the crime was a conspiracy, and not the crime of blackmail itself, we all agree that it was not necessary for the prosecution to prove that the conspiracy was successfully executed: that is, that any money had been in fact "obtained."

This question is moot. The money was paid.

My brothers think that, even so, it was relevant to show that the scheme proved successful as part of the proof that there had been a scheme at all.

This is elementary, but the proof must be in accordance with established rules of evidence. No one objected to the victims telling what they did, what they saw and what they heard, before and at the time of the payments. The scheme was to have Bioff and Browne use their position in every way possible to obtain money for themselves from any and all persons, corporations and associations, including their union. And the purpose of the victims was to operate their theaters as cheaply as possible and to pay as low a wage as would be tolerated by the men. Such conclusions can be drawn from the facts and circumstances. The circumstances should not have been colored before the jury or in the upper courts by hearsay and opinions of victims.

They believe that there is a rational connection between the existence of the criminal agreement—the "partnership in

crime"—and the fact that the acts upon which the conspirators agreed,

There is no evidence as to what "acts upon which the conspirators agreed" except as to what was said and done at the time. This should not include state of mind and hearsay.

when carried out, had the expected effect upon those against whom they were directed.

It is reasonable to conclude, from the proof, that the movie moguls were making so much money by reason of the combine they had erected, that the defendants believed that they would prefer to pay crooked officials to betray their union, rather than to pay the union men the wages demanded. The cost of wage increases to the IATSE not only added to expense of operation, but if allowed, such increases would bring similar demands from numerous other unions. It is all right to look to proper evidence for "the expected effect", but here again the evidence should not have been colored with opinion and hearsay.

They further believe that, even if this connection be not perfectly faultless in logic, the distinction is too formal and too fine drawn to be treated seriously, and that we should not strain to enlarge its importance.

To what distinction are Judge Swan and Judge Clark referring? We are unable to follow them. Do they mean the distinction between what they hold and (a) logic, (b) the facts in the case, or (c) the law of evidence.

For these reasons they believe that we should hold that it was not an error at all to admit the testimony.

Judge Swan wrote the opinion in the Greater New York Live Poultry C. of C. v. United States, 47 Fed. (2) 156, which was relied upon in the trial court by the prosecutor (R. 961). In that case the market men were properly permitted to give

their reasons for not doing business with certain victims. The case is distinguishable because the evidence was given by an actor in the conspiracy and described his conduct, verbal acts. It is difficult to understand why Judge Swan does not cite the case here, it is on the same subject. The trial court was either right or wrong in following it here. This failure, on the part of the Circuit Court to fully discuss the action of the trial court, was called to its attention on Petition for Rehearing (R. 4209).

It seems to me, on the other hand, that the only evidence relevant to the existence of a conspiracy are facts which come, or at least might have come, to the knowledge of the conspirators, among which, obviously, the undisclosed mental states of mind of the victims in the case at bar could not be.

This is a near approach to our position. It should be emphasized that "facts" are here spoken of. A state of mind four years after the event is not a fact and what the victims may have heard after the payment is not a fact. Nor is it a fact when victims tell of murders and bombings they heard of during their entire business career.

What they told Bioff of their reasons for paying him was of course relevant, for it would be part of the nexus of information with which all were charged in the prosecution of their common enterprise; it became a part of their mutual understanding.

There never was any objection to evidence of this sort. It is very meagre for the reason that some of the "victims" were mere errand boys and had not dealt with Bioff. As to Schenck upon whom the demand was first made, Bioff did all of the talking and that was very little, beyond the statement that the movie people had saved a lot of money by defeating the union on the west coast, and that they (the union) wanted that money back. Bioff did say, at one time,

that he would tie up the exhibitors. After the Chicago strike demonstrated their power, there was very little left to say. The jury had all of that evidence and it was for the jury to say: "Why" the money was paid.

But I cannot see how what they did not tell, could be relevant.

It is unfortunate that Judge Hand did not make it clear here that they "did not tell" of murders and bombings. There was no such testimony in the record outside of the hearsay. The victims and the errand boys didn't tell of the murders and bombings in this connection until after Bioff started to tell of their relations before the grand jury.

It is difficult to learn from the report of *Nick* v. *United States, supra*, 671, 672 (122 Fed. (2) 660 (C.C.A. 8)) whether that case supports my brothers' views; I, at least, am not sure whether the indictment was for the conspiracy—there clearly was one—or the substantive crime.

The Nick case included both conspiracy and the substantive crime. Also the Sherman Act.

The reasoning seems to indicate that it was for the second; yet the crime is spoken of as a conspiracy.

Judge Hand might also have observed that subsequent to the Nick case, this court considered and decided the same point to the contrary in the Teamsters case.

But, although I think that it was an error to admit the testimony, I do not believe that it requires us to reverse the convictions.

It is difficult for us to imagine any evidence which could be more harmful.

It might have done so, if the victims had based their fears upon what the accused had done in the past; but the testimony did not in this way covertly convey to the jury an accusation of earlier and independent crimes.

But the victims did say that these defendants had a murder or two to their credit. This failure on the part of Judge Hand to comprehend the record was called to his attention on Petition for Rehearing (R. 4208). In this connection please see the argument of the prosecutor, where he seized upon this evidence to condemn these defendants for bombings, murders, kidnapping and every crime on the calendar. Indeed, it did not appear that any of the accused on trial had ever called a strike in the past (Kaufman may have, but not in Chicago, where these victims did business).

This is an illogical switch of terms again. Judge Hand had been discussing Bioff. Bioff created the fears and Bioff called strikes. "The accused on trial" did not call strikes, neither did they coerce anyone, or did they obtain any money from the victims. "The accused on trial" carried on all of their dealings through Bioff and Browne. (We except Barger who paid money to D'Andrea but he gave no fear testimony against the persons on his payroll. His fear too was of Bioff.)

The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes.

The state of mind and hearsay evidence was not so limited. It included that which the producers had learned of Bioff's associates after Bioff exposed the matter before the grand jury. The hearsay evidence furnished a missing link which was seized upon by the prosecutor to make it appear that the victims paid because of their fear of the Capone gang, a desperate group of outlaws. Without the hearsay testimony the jury may have been able to try the real issue without this appeal to prejudice.

As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury.

The evidence went further than what everyone knows about strikes. There was no need to prove merely what everybody knows. A comprehension of the record will show how the prosecutor seized upon every insinuation possible to connect your petitioners with murders and bombings. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes.

The inconsistency of this with the undisputed proof is that those of your petitioners who shared the money took pains to stay out of the picture. The Chicago strike gave Bioff all the power required. He never claimed, nor did any of the victims claim, that at the time Bioff put on the pressure that he revealed that he had any associates.

We are satisfied that the accused had an impartial trial, and that no honest jury could have failed to convict them. The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence. The convictions are affirmed.

KAUFMAN'S CASE

The chief difference between Kaufman's appeal and that of the others, is in the evidence against him, a summary of which is as follows. Among the producers were Warner Brothers who, through a subsidiary, had been exhibiting films in New Jersey under a wage-scale contract with the local which expired on September 1, 1936. In August of that year the "zone manager" of Warner Brothers, Jacocks, sent his personnel manager, Morgenroth, to negotiate a new contract with a committee of the union, who were accompanied by three officers of the local, one of whom was Kaufman, the local agent of the New Jersey local. The committee dropped out during the negotiations, and early in October Warner Brothers reached an agreement with Kaufman and his two colleagues. Shortly thereafter Jacocks drew out $15,000 in cash and gave it to Morgenroth; who on the next day gave it to Kaufman. Morgenroth asked him at the time whether he had to "split" the money "with any of the other fellows"—meaning the two other officers of the local—and Kaufman answered that he did not, and that they knew "nothing about it"; but he added that he did not get a cent, because "I have to go across the river." Somewhat later Jacocks also had a talk with him in which he said "that he had to take that money over the river and turn it over, and he did not get any of it." The 1936 contract expired at the end of August, 1939; and there were again preliminary conferences between officers of the local and Warner Brothers; but this time Kaufman was alone, after the wage-scale committee had retired. He then asked for $10,000, telling Jacocks that he had had to pay to Bioff the whole $15,000 received in 1936. The parties finally agreed that he should have $5000 in two instalments which were paid in 1939 and 1940. At the time the second instalment

was paid he for the third time declared that the whole of the first payment had gone to Bioff.

Bioff's story was that Kaufman had come to him, had told him that he was having trouble in getting an increase of wages for his men from Warner Brothers, and had asked him whether he could "help." Bioff had then gone to Phelps —the "labor contact man" for Warner Brothers—who told him that Kaufman was unreasonable and threatened to strike, and that Phelps was looking to Bioff "to see to it that we get straightened out." Bioff answered that he would not let Kaufman strike, but Phelps should "get straightened out with Kaufman even if it costs some money." Bioff swore that Kaufman had never paid him any part of the money, and that when he had complained of this to Nitti, Nitti had told him to let it pass, because Kaufman was Zwillman's "man" and would arrange the matter with him. Bioff protested that this was irregular, but took no measures to force the payment. The only other testimony connecting Kaufman is that in the spring of 1934 when several of the group were discussing how to elect Browne as president of the union, one, Buchalter, had said that he would see to it that a person named Zwillman "delivers Kaufman."

If the jury believed Bioff, they could scarcely have avoided the conclusion that, when Jacocks and Morgenroth paid Kaufman $15,000 to settle the difficulties which had arisen about the new wage-scale contract, it was because Bioff had intervened with Warner Brothers on Kaufman's behalf, as Kaufman had asked him to do. It is true that the money did not go to raise wages, which was what Kaufman had said he wanted, but nevertheless Kaufman had accepted it, and there was every probability that it had been paid to avoid a break down in the negotiations, and a consequent strike. If in addition to this, Kaufman told the truth when he said that he had paid the whole amount to Bioff, no other

conclusion was possible than that he was a party to the general conspiracy. Obviously, he would not have done so, unless he expected some equivalent, either by way of profit or of immunity. There may be honor among thieves, but there is no maudlin munificence. The jury was free to disbelieve this part of Bioff's testimony and to convict Kaufman on his own declaration. On the other hand, it would make no difference, if in fact they thought that Kaufman never did pay the money to Bioff. When Kaufman said that he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself. Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it. If in fact he was as faithless to his accomplices as he had been to his local, that did not disprove that they were his accomplices as he had implied; and the jury might take him at his word.

There remain certain questions as to the competency of testimony admitted against him. In 1934 when some members of the group were discussing the election of Browne as president, as we have just said, Buchalter told them that Zwillman would see to it that Kaufman would turn the vote of the New Jersey local. This may have been inadmissible when Bioff testified to it, but we have never held, and we do not think, that the order of proof is important. As soon as it appeared from the testimony we have just set out, that Kaufman later became connected with the conspiracy, all evidence became competent against him, of whatever had been theretofore done in its execution. *Van Riper* v. *United States*, 13 Fed. (2) 961, 967 (C. C. A. 2); *Coates* v. *United States*, 59 Fed. (2) 173, 174 (C. C. A. 9); *Lefco* v. *United States*, 74 Fed. (2) 66, 68, 69 (C. C. A. 3). The declaration in question was not narrative; it was an act in furtherance of the common enterprise. Again, Bioff's talk with Nitti

about bringing Kaufman to account for the payment of $15,000, was of the same kind, except, indeed, for the added fact that it was after Kaufman was shown to have joined. Next, the testimony as to what Kaufman said at a public meeting, held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who should testify against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth. If it "prejudiced" Kaufman, that was precisely its entirely laudable purpose. Finally, Kaufman's interview with Jacocks in 1932 was also admissible. If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as such to negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration.

The supposed excesses of the prosecutor in his summing up to the jury, we have already dealt with upon an application for bail; we then said, and we now repeat, that he did not go beyond "permissible limits."

Judgment affirmed as to all the appellants.

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Supreme Court of the United States

October Term, 1944

No. 942

FRANCIS MARITOTE
Petitioner

against

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT and BRIEF IN SUPPORT OF PETITION

VITO MARCANTONIO
Counsel for Petitioner

BENJAMIN D. STEIN
Of Counsel

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Supreme Court of the United States

October Term, 1944

No. .....

FRANCIS MARITOTE
Petitioner

against

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Francis Maritote, respectfully alleges:

A

Summary Statement of Matter Involved

Petitioner, by an indictment filed in the United States District Court for the Southern District of New York, on March 18, 1943, was charged, together with Frank Nitti, Paul DeLucia, Phil D'Andrea, Charles Gioe, John Rosselli, Louis Kaufman and Ralph Pierce, together with George E. Browne, William Bioff and Nick Circella, confederates, and with other persons unknown to the Grand Jurors, with entering into a conspiracy and conspiring

with each other to violate Section 420a of Title 18, U.S.C.A., known as the Anti-Racketeering Act. The indictment alleged that the aforesaid conspiracy was entered into on or about said day of June 18, 1934, within the Southern District of New York, and within its jurisdiction, wherein they conspired and agreed to obtain money by the use of and threat to use force, violence and coercion from persons or corporations engaged in interstate commerce in the production, distribution or exhibition of motion picture films.

The persons or corporations designated and referred to therein as "victims" included Loew's, Paramount, Twentieth Century-Fox and other firms, persons and corporations, "whose names are to the Grand Jury unknown." This indictment was certified by the Grand Jurors as a true bill.

The trial of the action occupied approximately twelve weeks.

Frank Nitti died prior to the trial, resulting in a dismissal of the case as to him. The motion to dismiss against Ralph Pierce was granted at the conclusion of the evidence. Kaufman was sentenced to seven years imprisonment and to pay a $10,000 fine. The remaining defendants, including petitioner, were found guilty by the jury and received the maximum sentence of ten years imprisonment and were each fined $10,000.

An appeal was thereafter taken to the Circuit Court of Appeals for the Second Circuit and on December 20, 1944, the said Court filed its opinion affirming the judgments of conviction. A petition for rehearing was denied on January 8, 1945.

To avoid repetition and for the sake of brevity, the matters set forth in the petitions and briefs filed in this Court by the other defendants for a writ of certiorari are herewith in all respects adopted by the petitioner who respectfully requests that the same may be considered as though they were incorporated herein.

Bioff and Browne were the principal witnesses who testified for the Government as to the formation of the conspiracy alleged in the indictment. These two witnesses testified that some time in April, 1934, in a house at Riverside, Illinois, a suburb of Chicago, several meetings took place between themselves and Nitti, Compagna, DeLucia and Circella. Included with the aforementioned were Frank Rio and Louis Buchalter, more notoriously known as Lepke. Browne, at the time was an official of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, commonly known as the I.A.T.S.E., a labor union affiliated with the American Federation of Labor. Bioff was the personal representative of Browne.

It is alleged that at these meetings the conspiracy was hatched wherein and whereby it was agreed that control of the I.A.T.S.E. was to be obtained through the medium of the election of Browne as International President of the Union at the coming elections in October, 1934, to be held in Louisville, Kentucky, where the convention was to meet. Bioff testified that ways and means were discussed at these meetings to bring about the election of Browne at the coming convention in Louisville.

It was testified to that petitioner was present at the said convention in Louisville, Kentucky, not as an accredited delegate thereto, but was there for the purpose of intimidating the delegates and to see that they voted for Browne (R. 146). Browne had no opposition for the office of President of the International and was elected.

This is the first mention of petitioner in connection with the alleged conspiracy, no direct testimony having been presented or adduced at the trial that petitioner had participated in the aforesaid meetings where the conspiracy is alleged to have been born. Nor was there any direct testimony presented by the Government that petitioner knew of the existence of such conspiracy or its purposes, either at the formation thereof or at any time thereafter.

Petitioner is next mentioned by one Barger, who testified that after being in the circus business in Iowa, he moved to Chicago in 1932 where he opened a burlesque theatre known as the Star and Garter (R. 2110). In order to stifle competition, Barger, in 1932, paid the operators of the Haymarket Theatre, competitors who conducted a similar enterprise, the sum of $150 a week not to renew their lease. This was agreed to in writing, and when Bioff and Browne complained that this agreement would result in the lay-off of union men, Barger agreed to pay and did pay to Bioff and Browne the sum of $150 per week until 1935, when the Star and Garter Theatre closed (R. 2113).

Thereafter, Barger opened another burlesque house in Chicago known as the Rialto and Barger testified that he paid Maritote the sum of $175 per week commencing some time in December, 1935, or January, 1936, and extending to September 8, 1937, when the last payment was made (R. 2125, 2127); that petitioner performed no services in consideration for said payments; that after he paid petitioner the last sum of money, petitioner did not communicate with him further and had nothing to do with him after that time (R. 2171); that Barger had no contacts with any of the other defendants in this case about the payments (R. 2178). Barger further testified that petitioner refused to take any more money from him (R. 2170) and that he no longer had anything to do with petitioner who dropped out of the picture as far as he was concerned in September, 1937 (R. 2190); that petitioner was at the home of Ralph Capone (R. 2927).

B

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Criminal Court, as amended by the Act of February 13, 1925; and Rule XXI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

Statute Involved

Section 420(a) of Title 18 of the United States Code of the Act of Congress, dated January 18, 1934, entitled "An Act to Protect Trade and Commerce against Interference by Violence, Threats, Coercion or Intimidation" and known as the Anti-Racketeering Act. The material portions of this Act so far as relevant to this cause, provide:

> (420a) "No person should, in connection with or in relation to any act, in any way or in any degree affecting trade or commerce of any article or committee moving or about to move in trade or commerce * * *
>
> "Obtains or attempts to obtain by the use of or attempt to use or threat to use force, violence or coercion, etc. * * * shall be punished by imprisonment from 1 to 10 years or by a fine of $10,000, or both." (June 8, 1934, Ch. 569, Sec. 2, 48 Stat. 979.)

D

Questions Presented and Reasons Relied on For the Allowance of the Writ

The petitioner herein hereby adopts all the statements set forth under this heading contained in the petitions herewith filed by the other defendants and respectfully prays that this Court consider such statements as though herein set forth.

Petitioner has been found guilty and sentenced to a maximum term of 10 years imprisonment and to pay a fine of $10,000 upon evidence so unsubstantial as to constitute a denial of due process of law guaranteed by the Fifth Amendment.

(I)

The only evidence contained in the record from which the Government attempted to blanket Petitioner with the conspiracy is that (1) he attended the convention in Louisville, Kentucky of the I. T. A. S. E. in 1934 when Browne was the unopposed candidate for the Presidency thereof, (2) that he collected monies from Barger in Chicago for a period commencing December 1935, or January of 1936, and ending September 8th, 1937, and (3) that he was at the home of Ralph Capone (R. 2927). Such is the sum of the proof and upon said proof Petitioner was convicted.

It is significant, as was shown by the testimony, that there were many others at the said convention in addition to Petitioner and who were known to the Government but who nevertheless escaped indictment. It is significant for the reason that the Government realized that the mere presence at the convention was not sufficient proof even for an indictment to spell out knowledge of and adherence to the conspiracy of such "wide scope, long duration, vast returns" as stated in the opinion of the Court below. Not a scintilla of evidence was presented at the trial which would even tend to indicate that Petitioner participated in any act at said convention to bring about the furtherance of the alleged conspiracy. There is not an iota of evidence to warrant the conclusion indulged in by the Prosecutor with assention of the Court that Petitioner was delegated by the Defendants the function of channeling the votes cast at said convention for the election of Browne.

(II)

The question as to whether Barger, an exhibitor, was one who was engaged in interstate commerce was a fact which necessitated proof thereof and to establish such fact was of the utmost importance. No proof whatsoever

was elicited for the record to establish the interstate character of Bargar's burlesque house. This is the kernel of the case and the failure of such proof was fatal and removed Petitioner from the orbit of the entire charge contained in the indictment.

(III)

The wholly unwarranted conclusions without any basis in fact indulged in by the Prosecutor on the trial of this action were of such persistency and character as to deprive Petitioner of due process of law. The proceedings were conducted by the prosecution in such a prejudicial spirit and manner and such inexcusable tactics were indulged in before the Jury as to render the trial of Petitioner a farce and to do violence to the fundamental concept of the well established doctrine pertaining to a fair trial. The persistent comments of the Prosecutor and the tactics employed before the Jury created such an atmosphere of prejudice as to destroy any semblance of a fair and impartial trial to which Petitioner was entitled.

(IV)

No further mention is made of petitioner in connection with or in furtherance of the purposes of the alleged conspiracy after 1937. If it was to be assumed arguendo that petitioner was a member of the alleged conspiracy with knowledge of its purposes and knowingly committing acts in furtherance thereof, a period of six years had elapsed between the final collection of moneys from Barger in 1937 to the indictment filed in 1943.

Nowhere in the record is there any evidence connecting petitioner with the conspiracy as alleged in the indictment within three years prior to the filing of such indictment.

Barger testified that petitioner had refused to collect any further moneys from him and so informed him (R.

2188) and that petitioner completely dropped out of the picture at that time (R. 2190).

Under the circumstances, the instruction of the Court to the jury with respect to the law as to the statute of limitations deprived petitioner of the benefit of such statute. The evidence as contained in the record with respect to the activity of petitioner in the alleged conspiracy if we were to assume that petitioner was at any time a member thereof, and the failure of the Government to present any further acts committed by petitioner from 1937 to the filing of the indictment in 1943 constituted an abandonment of such conspiracy by petitioner as a matter of law. In spite of the fact that Barger established that petitioner withdrew and abandoned the alleged conspiracy in 1937 and no further mention is made of petitioner as to the commission of any acts in furtherance thereof or participation therein for a period of six years, the Court instructed the jury that it was still incumbent upon petitioner to take "some affirmative step which is inconsistent with this form of participation. He must do something to arrest the progress of the conspiracy."

The cases do not say what would constitute an affirmative step. What further act was necessary for petitioner to take to commence the tolling of the statute so as to bar prosecution for the alleged conspiracy?

In instructing the jury that it was incumbent upon petitioner *to do something* to arrest the progress of the conspiracy in order to commence the tolling of the statute, it would appear that it was incumbent upon petitioner to present himself before the prosecuting authorities, confess his membership in a conspiracy and request them to arrest him and the progress thereof. Under the instructions submitted by the Court to the jury, the benefit of the statute of limitations was foreclosed to the petitioner.

It was not contended by the Government that petitioner was one of the original conspirators, or participated

in the formation of the conspiracy from its inception, had anything to do with it or had any knowledge concerning it; rather that petitioner was a minor character, joined the conspiracy after it was born and committed acts in furtherance thereof as manifested by his presence at the Convention in 1934 and the collection of moneys from Barger.

These were the facts which were presented to the jury for their speculation,—circumstantial evidence from which they were to infer petitioner's adherence to the alleged conspiracy to sustain the Government's contention. Since the evidence attempting to connect petitioner with the alleged conspiracy was purely circumstantial, it was error to deny petitioner's motion to dismiss upon the ground that petitioner's conduct of non-activity for a period of six years constituted an affirmative act of abandonment of the alleged conspiracy as a matter of law. (*Buhler* v. *United States*, 33 F. 2d 382.)

Wherefore, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit requiring that Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and of proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: New York, N. Y., February 9th, 1945.

Francis Maritote,
Petitioner

By Vito Marcantonio,
his Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The record is barren of any evidence to connect the petitioner as co-conspirator with the other petitioners herein in the alleged conspiracy, and the Court should have directed a verdict in his favor.

There is a complete failure as to petitioner of any direct evidence to connect him with any conspiracy as alleged in the indictment. Nowhere in the record from the testimony of any of the witnesses, including Bioff and Browne, is there any proof whatsoever that petitioner participated at any time or in any way in the meetings alleged to have been held in 1934 in Riverside, at which time and place, the Government contends the alleged conspiracy was born. Nor is there any direct evidence anywhere in the record to indicate that petitioner had any knowledge of such meetings or of the alleged scheme or schemes that were devised thereat. The record is entirely barren of any testimony which would indicate that petitioner committed any acts with knowledge of furthering the purposes of the alleged conspiracy. Nor is there a scintilla of direct evidence in the record to indicate that petitioner subsequently acquired knowledge of the formation and existence of the said conspiracy and was cognizant of its purposes.

Certainly the presence of the Petitioner at the convention in and of itself did not constitute proper evidence so as to establish him a member of the conspiracy as alleged in the indictment and did not establish a factual basis from which the Jury should be permitted to infer therefrom and speculate thereon to reach a conclusion that

such presence was for the purpose of knowingly furthering the aims of said conspiracy.

There is no evidence whatsoever in the record to support the Government's contention as stated to the Jury that the function of Petitioner's presence at said convention was as a "muscle-man" to intimidate delegates for the purpose of insuring Browne's election. Nowhere does it appear in the record that Petitioner did anything, or committed any act at said convention which would form a factual basis for said contention from which such an inference could legally be drawn. Thus an inference upon an inference was permitted and indulged in at the trial, *e.g.*, from the mere fact that Petitioner was present at the convention it was to be inferred that he was there as a member of the conspiracy with full knowledge of its existence and purposes in the role of a "muscle-man" to intimidate all delegates so that their votes would be cast for Browne. From this inference another was permitted to be drawn therefrom and to speculate thereon that such delegates were intimidated by Petitioner's presence and by reason thereof brought about the election of Browne.

There were many others at this convention as the testimony shows,—Romano, Joe Batters, Charlie Imburgio and Bob McCullough,—who were not accredited delegates to the convention. Nevertheless no one other than Petitioner was indicted as being a member of the alleged conspiracy for the obvious reason that the Government realized, and properly so, that the mere presence at the convention was not sufficient evidence so as to form a factual basis which would properly permit an inference to be drawn therefrom to the effect that such presence was motivated by an agreement with knowledge and intent thereof to commit the acts set forth in the indictment.

Pierce's inclusion in the indictment was prompted by the fact that he drove Browne in an automobile to meet Frank Rio at the instruction of Gioe and was present at the conversation which occurred between Barger and Rio

(R. 1032-33). The motion to dismiss against Pierce was properly granted on the ground that there was no evidence introduced by the Government to show that Pierce had any knowledge of any alleged agreement to extort, as set forth in the indictment and that mere association with the co-conspirators was not sufficient to warrant submission of his case to the Jury. Petitioner's position was no different from that of Pierce and the motion to dismiss should similarly have been granted as to Petitioner.

That one may subsequently enter into or adhere to an existing conspiracy is well settled but it is incumbent upon the Government to prove beyond a reasonable doubt by producing proper and forceful evidence that the individual agreed to enter into a conspiracy with knowledge of its illegal purpose or committed such overt acts encompassed by the conspiracy from which such knowledge could properly be inferred. No such evidence in connection with Petitioner's presence at the convention is present in the record herein. In attempting to establish an overt act committed by Petitioner at the convention from which fact it could then reasonably be inferred that the purpose of Petitioner's presence was to insure the votes of the delegates for Browne, the Government attempted to produce a Dr. Papp who was not an accredited delegate to the convention and attended thereat voluntarily and was a friend of Bioff. The Government attempted to obtain from Dr. Papp testimony that he was handled roughly by a group, of which Petitioner was one. The ludicrous and picayune character of this testimony upon which the Prosecutor attempted to place such great weight for the purpose of establishing a factual basis from which an inference could be drawn for the purpose of establishing that Petitioner was acting pursuant to an agreement as a co-conspirator under this indictment is a clear indication of the desperate condition that the Government found itself in in its case against Petitioner.

Barger's testimony shows that he paid the petitioner sums of money commencing December, 1935 or January, 1936, and extending to September 8, 1937, when the last payment was made. It is this testimony upon which the Government relied more heavily in its attempt to link petitioner as a co-conspirator and was the basis for the Court's statement in the opinion below, "We start therefore with the hypothesis that all of the accused now at bar were parties to a blackmailing conspiracy of wide scope, long duration and vast returns." This conclusion is based not on evidence, but on speculation and suspicion.

It was still incumbent upon the Government who had the burden of proof in a criminal cause to establish beyond a reasonable doubt that such payments from Barger were received by petitioner as a co-conspirator and that such moneys were received by petitioner in accordance with and pursuant to the conspiracy set forth in the indictment. This evidence was not sufficient to warrant the submission of petitioner's case to the jury for speculation. Suspicion does not take the place of evidence and is not a substitute therefor. The utter failure of the Government to establish by competent proof that petitioner received this money as a result of the unlawful agreement charged in the indictment, with full knowledge thereof and in furtherance of its aims and purpose, was fatal.

In *Weniger* v. *United States* (C. C. A. 9), 47 Fed. (2nd) 692, 693, the Court said:

> "Neither will the commission of an avert act, although unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

To the same effect is *Dahly* v. *United States,* 50 Fed. (2nd) 37, 43:

> "Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of the conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein with knowledge of the agreement."

The cases hold with unanimity that one cannot be held to be a party to a conspiracy unless it be shown by competent and convincing proof that he had knowledge of the conspiracy and intentionally committed some act in furtherance thereof. (*United States* v. *Crimmins* (C. C. A. 2nd) 123 Fed. 2nd, 271; *Kassin* v. *United States,* 87 Fed. 2nd 183; *United States* v. *Falcone,* 311 U. S. 205. See also *Gerson* v. *United States,* 25 Fed. 2nd 49.)

It is equally well settled that hearsay testimony cannot be used to connect an alleged conspirator with a conspiracy by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. Declarations of one conspirator to another are not competent evidence to establish the connection of a third person with such conspiracy. (*Glasser* v. *United States,* 315 U. S. 60; *Kuhn* v. *United States,* C. C. A. 9, 26 Fed. (2nd) 463.) Proof of mere association is not sufficient; the evidence must establish the existence of the conspiracy charged, the knowledge thereof by the defendant and intentional participation therein. By reason of the foregoing, the Court should have directed a verdict for petitioner.

POINT II

The dealings between petitioner and Barger were purely of a local nature.

Proof that Barger was engaged in interstate commerce was a jurisdictional requisite for the prosecution of this cause. It is the heart of the indictment and the extraction or removal therefrom of this element renders the whole charge untenable. Barger leased or purchased his pictures from a distributor located in Chicago and merely exhibited such pictures. The exhibition of such films leased or purchased from the distributors did not bring Barger within the ambit of interstate commerce. These payments were purely of a local nature and collateral to the issues involved in this case. The Court below in its opinion stated that the business was interstate as a matter of law and the question should not have been submitted to the jury; and since nobody contested the facts, but only its legal effect it was unnecessary for the Judge to say anything on the issue. It is respectfully urged that there was a serious question as to whether or not Barger was engaged in interstate commerce and that such question was one for the jury for its determination and that the denial of petitioner's motion for such submission was error.

This fact must be proven like any other fact in a criminal case and since Barger was the one whose testimony precipitated petitioner in this cause his status with respect to interstate commerce was particularly important to petitioner. Since it goes to the jurisdiction of the Court in this cause it necessarily follows that unless it is proven beyond a reasonable doubt the conviction of the petitioner must fail. The films that Barger had purchased or leased had come to rest and their movement had certainly ended with their delivery to Barger's theatre, the

Rialto. These films may be exhibited for a run for weeks or for such period as the exhibitors may choose to display them. The fact that these films might afterwards be reshipped through various States does not cloak them with perpetual motion. Their movement comes to rest at some point and certainly at the point of exhibition by the local theatre. (*Schechter Poultry Co.* v. *United States*, 295 U. S. 495, 55 S. Ct. 838; *A. C. L. R. R. Co.* v. *Standard Oil Co.*, 12 Fed. 2nd, 540; *Fox Film Company* v. *Trumbull*, 7 Fed. 2nd, 715.)

The trial Court however, resolved the issue as a matter of law holding that in view of the fact that the moving picture industry was engaged in interstate commerce, any extortion from any part of the industry came within the purview of the entire racketeering act. It is respectfully submitted that films during their exhibition are not *moving or about to move* in interstate commerce. The foreclosure by the Court of this question in its refusal to grant the requested charge that it was the burden of the Government to prove beyond a reasonable doubt that Barger was engaged in interstate commerce was error which at least entitles petitioner to a new trial. (*McAdams* v. *United States*, 74 Fed. 2nd, 37. See also, *Penn. R. R.* v. *Donat*, 239 U. S. 50; *Apex Hosiery Co.* v. *Leader*, 310 U. S., 469.)

POINT III

The indictment and prosecution of petitioner was barred by the Statute of Limitations as a matter of law.

If we were to assume that petitioner was a member of a continuing conspiracy, then it is respectfully submitted that the statute had tolled and barred a prosecution therefor. The record discloses, as hereinbefore stated that petitioner's last act in this picture was the receipt of moneys from Barger on September 8, 1937. No further mention is made of petitioner as having done or committed any act thereafter to the time of the indictment six years later.

No proof was offered by the Government to establish that petitioner participated in any of the acts committed after 1937 or had any knowledge whatsoever or approved any acts in the furtherance of the alleged continuing conspiracy. The rule appears well established that if one is a member of a conspiracy which is a continuing one, in order to effectuate a withdrawal so as to cause a tolling of the statute, he must manifest such withdrawal by some affirmative act to avoid being dragged along by subsequent deeds of his co-conspirators in furtherance thereof. (*Hyde* v. *United States*, 225 U. S. 347.)

However, it is respectfully submitted to this Court that the inactivity of petitioner after 1937 for a period of six years spelled out an abandonment to such a degree and nature as to constitute an affirmative withdrawal as a matter of law,—particularly when coupled with Barger's testimony that petitioner informed him that he refused to collect any further moneys.

The courts have not laid down any specific rule as to what would be a sufficient act of withdrawal or what would constitute competent or sufficient evidence to establish such withdrawal.

In *Buhler* v. *United States*, 33 Fed. 2d 382, the Court said that it can be shown by conduct "wholly inconsistent with the theory of a continuing adherence". (See also, *Eldredge* v. *United States*, 62 Fed (2nd) 449.)

Furthermore, since the Government's evidence with respect to petitioner was purely circumstantial, we may well adopt the language of the Court in the *Buhler* case (p. 384):

> "The Government does not contend that appellant devised or participated in devising the scheme in question or in its inception had anything to do with or knew anything about it."

And, further,

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial in practice often taking wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character."

Accordingly, it is respectfully submitted that it was the duty of the Court to hold as a matter of law that petitioner had effectively withdrawn from any part in the conspiracy "assuming that he was a member thereof" and that his prosecution therefore was barred by the statute of limitations.

POINT IV

The conviction of petitioner, brought about by the tactics and methods employed by the Government, is offensive to the fundamental conceptions of due process of law.

Testimony was introduced by the Government and erroneously admitted by the Court for no other purpose than to inflame the minds of the jury with respect to petitioner. Due process embodies fundamental principles of fairness; to a right to be tried by the fair and dispassionate presentation of the evidence. The whole record is permeated with instances of prejudicial error committed by the Government with respect to petitioner in the attempt to inflame the minds of the jurors so that they may disregard the evidence and to judge petitioner dispassionately and fairly upon such evidence.

In spite of the fact that the record is barren of any misconduct on the part of petitioner when he was present in Louisville at the time of the 1934 convention, we find this statement by the prosecutor (R. 3639):

> "And in addition certain members of this mob were delegated to the convention to make sure that everything goes right, and that is where our friend Frank Diamond makes his first appearance."

There is not a scintilla of evidence in the record that petitioner was delegated by anyone or did anything at the convention that could prove that he committed one act in the conspiracy charged or in furtherance thereof. And again we find the following (R. 3641):

> "Regarding this unanimous vote in 1934 and the fact that there was no opposition, suppose you were a delegate to that convention and you saw the hall policed by Circella, by Bioff, by Frank Diamond, by

> Lepke Buchalter, whose job it was to get Browne elected, would that have any effect upon your independent judgment, particularly when there was no one running against Browne."

We find no evidence in the record that anybody else was nominated to run for office in opposition to Browne or that your petitioner improperly influenced any delegate present at said convention or committed any act which would even tend to indicate or from which an inference as stated by this Prosecutor could be drawn.

The numerous errors in the admission of testimony, even with the latitude permitted in conspiracy cases are so glaring and their purpose was so obvious as to result in a flagrant denial of due process. The Prosecutor was permitted to elicit the wholly immaterial testimony through Barger (R. 2127-2128) to the effect that Barger (characterized in the opinion of the Court below as "this unfortunate man") paid a social call at the home of Ralph Capone on an occasion when Capone's mother-in-law was ill and there he saw petitioner and his wife in the premises at the time. And in answer to the question whether he had any words with your petitioner concerning any of his business, Barger answered in the negative. Upon this testimony was based the Prosecutor's summation to the following effect:

> "If Barger had any questions as to who Diamond was, these questions were easily resolved when he saw Diamond at Ralph Capone's house. That is in the testimony."

Not only did the Court refuse to strike this testimony but permitted the Prosecutor to comment upon it in his summation.

The record is replete with such irrelevant and inflammatory testimony for the purpose of creating an atmosphere of prejudice and passion. The Government was in

effect telling the jury with the sanction of the Court that this defendant was associated with notorious characters and even if the evidence was sufficient to convict petitioner, he was a disreputable character because of his associations and by reason thereof should be convicted. Nevertheless our laws do not as yet permit convictions on its citizens merely by reason of their associations or their reputation. In the atmosphere so created, one need not indulge in too much speculation to appreciate what happened to the fundamental concept of our laws that in a criminal cause, one is presumed to be innocent until proven guilty beyond a reasonable doubt by clear, convincing evidence and only on such evidence.

In *Beck* v. *U. S.*, 33 Fed. 2nd, 107, 114, the Court stated:

> "A trial in the United States Court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them can not be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of conviction."

Conclusion

This case presents important constitutional issues involving due process of law. It is respectfully urged that the record in this cause consists of a mass of errors which errors singly and collectively deprived petitioner of a fair trial and that his conviction resulting therefrom was a flagrant denial of due process of law. As was stated by Judge Swinford in *United States* v. *Moore*, 40 Fed. Sup. 543:

"There has grown up in this country a practice amongst United States attorneys to use 18 U. S. C. A. No. 88, the so called conspiracy statute, as a catch all or dragnet for everything and everybody, wheresoever found who might have had some remote connection with the substance of crime or crimes charged. This important and useful criminal statute has been prostituted beyond recognition. There is an attempt to ensnare not only those enacting the crime but any who might be standing in its shadow. * * * It should not be permitted to flourish."

Respectfully submitted,

VITO MARCANTONIO,
Counsel for Petitioner.

BENJAMIN D. STEIN,
of Counsel.

Office - Supreme Court, U. S.
FILED
FEB 13 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

J. BERTRAM WEGMAN,
HAROLD SIMANDL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A

Summary Statement of the Matter Involved

The Indictment

By an indictment filed in the United States District Court for the Southern District of New York on March 18, 1943, petitioner, together with others, was charged with a conspiracy in violation of Section 420a, Title 18, U. S.

Code, commonly known as the Anti-Racketeering Act. It was charged that Frank Nitto (or Nitti), Louis Compagna, Paul DeLucia, Phil D'Andrea, Francis Maritote, Charles Gioe, Ralph Pierce, John Rosselli and petitioner, defendants, together with George E. Browne, William Bioff and Nick Circella, confederates, and with *divers other persons to the grand jurors unknown,* conspired on or about June 18, 1934, and continuously thereafter to and including the date of the filing of the indictment, *in the Southern District of New York,* in connection with and in relation to acts affecting foreign and interstate trade and commerce, to obtain by the use of force, violence and coercion the payment of money from a group of named corporations and other firms, persons and corporations, *whose names were said to be to the grand jurors unknown,* who were described as the victims.

It was alleged that the defendants and confederates conspired to extort payments from the victims by the threat of obstructing and interfering with the production, interstate distribution and exhibition of motion pictures.

The alleged instrumentality was the power of a labor union, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (commonly known as the IATSE).

The three confederates named were connected with the IATSE as international president, personal representative of the president and international representative, respectively, and your petitioner was business agent of Local 244 (in Newark, N. J.) of the said union.

Motions

Petitioner joined in the preliminary motions made on behalf of other defendants. These are discussed in their

petition and brief, and so are not here repeated. Petitioner also made a separate motion for a bill of particulars, which was denied.

Petitioner repeatedly moved for a severance (R. 45, 79, 948-949, 2735, 3214, 3335).

The Trial

Bioff and Browne testified for the Government. In brief their story was that in the early part of 1934[1] they had several meetings at Riverside, Illinois, a suburb of Chicago, with Nitto, Compagna, DeLucia and Circella. Also present and participating in one or more meetings were Frank Rio and Louis Buchalter (R. 136, 141, 1036, 1038). Though identified to the grand jury who heard the very same testimony as that given at the trial (R. 802-807, 1281-1284), these two are not named in the indictment.

At these meetings an understanding was reached that Browne would be a candidate for the office of international president of the IATSE at its convention in June, 1934, and that the others would use underworld connections, which they claimed extended throughout the country, to insure his election so that control of the union could be used to make money for the conspirators (R. 138-141, 145, 1037-1041).

Browne was elected president of the union without opposition (R. 1041). Thereafter by instigating or encouraging demands by locals of the IATSE upon theatre operators in their respective cities,[2] Browne and Bioff created

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[1] The exact dates were not established (R. 136, 141), but they were prior to June 18, 1934, when the Anti-Racketeering Act first became law.

[2] Chicago (R. 168-169), New York (R. 196-199) and unnamed cities on the West Coast. They made no such claim regarding Newark, N. J., where petitioner's local, No. 244, is located. This is noteworthy, since if petitioner were in fact a member of this conspiracy, his locale would hardly have been so omitted.

situations in which they were able to collect tribute from the operators in return for settling the threatened strikes. They then made demands upon producers of motion pictures and succeeded in obtaining large sums from them (R. 216-220, 262-267).

Representatives of the "victims" testifying for the prosecution were asked what was in their minds (*though not disclosed*) when they made payments to Bioff. They were permitted to testify, over objection, that they were in fear of strikes which would close the theatres and the producing studios and ruin their companies, and also that they feared bodily harm. This testimony brought in references to bombs, stink bombs, damage to theatres, danger to patrons, and murders.

The first mention of petitioner in the evidence came in Bioff's testimony concerning the Riverside conferences at which the conspiracy was claimed to have been hatched. According to Bioff, one of the underworld connections then mentioned was with a certain "Longie" Zwillman in New Jersey (R. 140). Bioff (though Browne made no reference thereto) said that in the discussion of means to be used to assure Browne's election, Louis Buchalter[3] volunteered to see Zwillman and see to it that he "delivered" Kaufman (R. 145; cf. R. 1038-1039). Zwillman is not named in the indictment, although he, too, was named in the testimony before the Grand Jury (R. 802-807).

Parenthetically it may be noted that Bioff and Browne testified (R. 156, 1047, 1048) that they were introduced to the underworld connections (whom they named though the indictment did not), but never met Zwillman and did not know him.

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[3] Better known as "Lepke". At the time of this trial Buchalter was receiving wide publicity as the convicted chieftain of "Murder, Inc." and was under sentence of death for murder.

Based upon this hearsay testimony, which petitioner immediately moved to strike out, the prosecutor was permitted to proceed as though thereby petitioner had been connected with the conspiracy. He was permitted to introduce other testimony regarding Zwillman (R. 256-258, 1110, 3064, 3102), argue in the presence of the jury upon the assumption that Zwillman actually brought petitioner into the conspiracy (R. 3103, 3629, 3639, 3649-3651, 3656, 3658), and, by further hearsay testimony from Bioff linking their names, suggest a connection which was never proved. There was no attempt to prove that Buchalter ever did communicate with Zwillman, or that Zwillman even knew petitioner at the time.

Petitioner sought an instruction that this testimony could not be used to connect him with the conspiracy. The Trial Court refused (Request No. II, R. 3785, denied R. 3737). Instead, the jury was directly charged that such testimony was "*not alone sufficient to establish a connection* * * *". The Circuit Court of Appeals said this was "*other testimony connecting Kaufman*".

There was testimony of payments (aggregating $20,500) made by Warner Bros. to petitioner between 1936 and 1940 (R. 992-996). The first payment was made after negotiation of a wage contract in the Newark area had been fully completed, without any threat of strike, and with an increase in wages (R. 977, 991-992; Exh. UU, R. 4004).

No explanation of the payment was offered. The officer who directed the payment, one Bernhard, was available (R. 1635), but was not called. Instead the two subordinates (Jacocks and Morgenroth) who, as mere messengers, delivered the money to petitioner, testified. Neither had had any prior discussion about money with petitioner (R. 979). Neither knew anything about the proposed payment until they were called to New York and received the money

from one Patterson, with instructions to give it to petitioner (R. 954, 991). Patterson was dead at the time of the trial. The Court, over objection, permitted Jacocks, one of these messengers, to testify that the payment was induced by fear that the theatres would be closed and the studios would be closed (R. 959-962). No basis for his putative fear was shown. No reason for paying was expressed at the time. Jacocks made it clear that there had never been any labor trouble in the area of petitioner's local, nor ever any threat of any kind whatsoever by petitioner (R. 979). He had no fear of petitioner. He had not been threatened by anyone.

Bioff testified that after talking with Phelps (who was in charge of labor relations for Warner Bros.), late in 1936, he told Nitti that he had learned that Kaufmann had been paid $15,000; that he asked Nitti whether he should see Kaufman and get some of it or let Kaufman keep it. Nitti's answer was that Kaufmann should not be bothered; that he was Longie's man. The Court, after agreeing that it should be stricken as hearsay, changed his ruling and permitted this testimony to stand when the prosecutor argued that it would illuminate "whatever arrangement they may have had with Longie Zwillman". No such arrangement was ever shown nor was any implied in the conversation (R. 256-258).[4] The jury was permitted to consider this as evidence connecting petitioner, through Zwillman, with the Chicago defendants.

It was testified that petitioner had asserted on two or three occasions that he had had to take the $15,000 "across

[4] The opinion below paraphrases the testimony thus: "* * * Nitti had told him to let it pass, because Kaufman was Zwillman's 'man' *and would arrange the matter with him.*" As the emphasized words show, even the Circuit Judges accepted the prosecutor's argument as evidence. The witness made no such statement. If the Circuit Court of Appeals was so misled, can it be said that the jury did not fall into the same error?

the river" (R. 959, 992). He is alleged to have said three years later that he gave it to Bioff (R. 967, 996). There was no testimony that he ever mentioned any of the other defendants, or that he ever met any of them, or that he so much as knew of their existence.

The Court below said this testimony showed that petitioner "could not have been unaware that Bioff was not acting for himself". Why not does not appear. Then follows the *non sequitur* that petitioner was "therefore acquainted with the conspiracy"!

The testimony of Bioff and Browne referred to petitioner in terms appropriate to an outsider (R. 256-257, 1110). Both Bioff and Browne were willing witnesses for the prosecution. It is a matter of court record in the Southern District of New York that their sentences were reduced and they have been set at liberty in reward. They were at the very heart of the alleged conspiracy and the agents for its business. They professed to know all its intricacies. Neither said that petitioner was connected with the conspiracy, and Bioff directly denied that he was a member (R. 921, 943-944).

The other payments to petitioner were clearly independent of the least possible connection with the case. They were never so much as mentioned by Bioff (Browne never mentioned *any* of the payments). By the testimony of the "victim" they were shown to be quite apart from the crime charged, and since they show disassociation, are, if anything, exculpatory. Yet by the Court's charge, the jury was allowed to consider these payments as proof of guilt.

The prosecutor called as a witness one Roach, in an attempt to establish that petitioner, in association with Zwillman, had sent a package to Nitti in Chicago. Roach's testimony was shown to be so utterly false that the Court ordered Roach taken into custody as a perjurer (R. 2953,

2954). (It does not appear, however, that he has even yet been prosecuted for this venal offense.) Although the Court instructed the jury to disregard Roach's testimony in its entirety (R. 3717), the jury was not admonished to disregard the prosecutor's use of it in his summation (R. 3629).

Other testimony relating to petitioner concerned: another hearsay conversation between Browne and Nitti, which it has been argued showed a connection between Nitti and Zwillman, and in turn between Zwillman and petitioner (R. 1110); an occasion in 1932, upon which petitioner accompanied two other representatives of Local 244, and one of the other men placed a gun on a desk (R. 952-953); and a meeting of the local, at which petitioner is said to have made remarks which were claimed to be a threat against anyone present who should testify against him (R. 2301, 2309).

The payments, other than those to petitioner, made by the various victims amounted to well over a million dollars; in every instance arranged by and with Bioff. But Bioff had no connection with the payments to petitioner; the circumstances of those payments were altogether different.

The prosecutor misstated evidence and put before the jury alleged facts not in evidence. His summation was inflammatory, and as to petitioner it demanded his conviction in the expressed hope that he would thereby be constrained to testify against Zwillman. The Court refused effective admonition and denied proper requests for instructions.

The jury rendered a verdict against all of the defendants except Ralph Pierce, against whom the Court dismissed the indictment. Petitioner was sentenced to seven years' imprisonment and to pay a fine of $10,000, and the remain-

ing convicted defendants were sentenced to ten years' imprisonment and were each fined $10,000.

The other defendants except Maritote[5] have by their counsel, Wm. Scott Stewart, petitioned this Court for a writ of certiorari. Effort, in the interest of brevity, has been made to avoid repetition of matter set forth in their petition and brief, which, it is prayed, may be considered incorporated herein by this reference, as to matters applicable to all defendants.

B

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Second Circuit, which filed its opinion affirming the judgments of conviction on December 20, 1944 (R. 4191). A petition for rehearing was filed in due course and was denied on January 8, 1945 (R. 4202). The judgment and order for mandate is dated January 11, 1945 (R. 4203). Issuance of the mandate was stayed as to this petitioner pending this application.

The opinion of the Court below has not yet been reported.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

Questions Presented

1. As to the indictment:

(a) The indictment falsely alleged as unknown the names of persons known to the Grand Jury and named in the

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[5] Maritote has filed a separate petition.

testimony before the Grand Jury and at the trial as co-conspirators.

(b) The indictment falsely alleged as unknown the name of a person who testified before the Grand Jury and at the trial as an alleged victim.

(c) The Grand Jury falsely alleged that the conspiracy was formed in the Southern District of New York, whereas the testimony before the Grand Jury and at the trial clearly placed the formation of the alleged conspiracy in Illinois.

> Question: Have the constitutional rights of the petitioner been invaded by such an indictment, and therefor should the indictment have been dismissed?

2. The indictment was in general terms. It alleged no overt act. It was couched in the words of the statute without further specification of alleged wrongdoing. Petitioner sought a bill of particulars.

> Question: Was it error to deny particularization?

3. As to the evidence:

(a) Over petitioner's objection the Trial Court admitted, and permitted the jury to consider upon the issue of the connection of petitioner with the conspiracy charged, testimony of hearsay declarations by alleged co-conspirators (including one not even named as such) made out of the presence of the petitioner, prior to the time when he is said to have joined the conspiracy, prior to the date of its formation as alleged in the indictment, and prior even to the existence of the statute creating the offense. The Trial Court refused to charge the jury as requested by petitioner, that this evidence could not be considered to estab-

lish connection. Instead the charge was given that hearsay was "not alone sufficient to establish a connection".

> Question: Is it error to permit the jury to consider such hearsay testimony for the purpose of determining the connection of petitioner with the conspiracy?

(b) Over objection, the Trial Court admitted, and permitted the jury to consider upon the issue of petitioner's connection with the conspiracy charged, testimony of declarations of alleged co-conspirators made out of the presence of petitioner, not in furtherance of the alleged conspiracy, without any proof whatever that such hearsay declarations or the subject matter thereof were ever communicated to petitioner.

> Question: Is it error to permit the jury to consider such testimony as bearing upon the connection of the petitioner with the conspiracy charged?

(c) The only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged was the testimony of the Government's principal witness directly denying petitioner's participation. The circumstantial evidence was equally consistent with the inference of innocence of the crime charged as with the inference of guilt—indeed more consistent with innocence.

> Question: (1) Is it error to hold, as the Court below did, that the verdict of the jury forecloses any consideration of the circumstances, and eliminates appraisal of the varying inferences? (2) Can circumstances as consistent with innocence as with guilt support a verdict of guilt? (3) Can such a verdict, based upon such equivocal circumstances contradicted by direct evidence from the prosecution's principal witness, be sustained?

(d) Over objection the Trial Court admitted, and permitted the jury to consider, the testimony by alleged victims of their respective undisclosed mental operations at the time of making payments years before the trial. The testimony did not refer to anything objective, nor even to anything expressed at the time to which it was related. There was no way to test the accuracy of the narrative nor to demonstrate that it was an afterthought.

> Question: Since the charge was conspiracy, is it error to allow testimony of the undisclosed state of mind of an alleged victim of the conspiracy?

(e) The Court below recognized in its summary of the evidence that the payment of $15,000 made by Warner Bros. to Kaufman in 1936 was *after* Warner Bros. had reached an agreement on the wage scale contract. The Court below apparently recognized that Kaufman had never asked for or suggested the payment. Strangely, however, the Court below then said that "there was every probability that it [the money] had been paid to avoid a breakdown in the negotiations, and a consequent strike." Not only is this assumption of probability unwarranted in any event, but it is contrary to the clear and uncontradicted testimony of all of the prosecution witnesses concerned, that no breakdown in the negotiations had ever been threatened and no strike had been threatened. True, Bioff testified that Phelps told him that Kaufman had threatened to strike, but of course that was hearsay. Phelps testified that he had not told that to Bioff, and, moreover, that Kaufman had never threatened to strike, or made any other threat of any kind whatsoever. Jacocks and Morgenroth also testified flatly that Kaufman never made threats of any kind whatsoever, directly or indirectly. The Court below then held that if Kaufman said

he had turned the money over to Bioff, "no other conclusion was possible than that he was a party to the general conspiracy."

> Question: Is it error to resort to speculation to find support for an inference upon which a presumption may in turn be based?

(f) The Court below held that "When Kaufman said that he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself. Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it." There was no actual proof that petitioner knew of anyone behind Bioff. There was no actual proof that petitioner knew of any conspiracy; there was no proof that "his hearers" knew of any conspiracy. The suggested conclusion ignores the reasonable hypothesis that petitioner might, for all that appears in the record, have assumed that the payment made was for the benefit of the union, and have indicated payment over to Bioff, his superior officer and the acting head of the IATSE.

> Question: Is the inference of knowledge permissible? Can such an inference in turn support an inference of guilty connection?

(g) The prosecution offered testimony of a statement allegedly made by Kaufman at a public meeting. The Circuit Court of Appeals held that this testimony was properly admitted since it "*was susceptible of being understood as a threat against any present who should testify against him. It was competent * * * and its admissibility did not depend upon its truth. If it 'prejudiced' Kaufman, that was precisely its entirely laudable purpose.*" It was, in fact, demonstrated beyond doubt that the statement was

not even remotely related to this case, was not a threat, that no one so understood it and that no one was thereby (or otherwise, for that matter) deterred from testifying. More important as a matter of law, there was no attempt on the part of the prosecution to show that the statement related in any degree to this case or was directed to the attention of any prospective witness; not even that there were any such witnesses. The Trial Court overruled objections to the testimony in the first instance, and denied motions to strike. A requested instruction (#11, R. 3789) that such testimony could have no tendency to prove petitioner's connection with the conspiracy was denied.

> Question: Is it error to permit the jury to consider as evidence of spoliation, and therefore of consciousness of guilt, testimony concerning conduct not shown to have any connection with the case on trial?

(h) The witness Jacocks testified:

> "Q. Will you tell us when you first officially met Kaufman, Oppenheim and Gehring? A. Approximately eleven years ago now.
>
> Q. That is the first time you officially met them? A. Yes.
>
> Q. Will you tell the jury what happened on that occasion? A. They visited me in my office and told me that they were in charge of the Essex County local of projectionists, and I have forgotten the other details, but in substance that is it.
>
> Q. Was there anything else that happened on that occasion? A. Well, Andy Gehring put a gun on my desk at that time.
>
> Mr. Simandl: I object to that and move to strike it out.
>
> The Court: Was Mr. Kaufman there?
>
> The Witness: Yes, sir, he was.
>
> The Court: The motion is denied.
>
> Mr. Simandl: I respectfully except.

> Q. Was there anything else said that first meeting that you recall? A. I do not recall the details other than to indicate to me that they were in charge of that local and it would be good business for me to get along with them."

Petitioner moved several times to strike this testimony (R. 975-976, 2730). No other testimony in the case referred to this incident. It was amply proved by every one of the prosecution's witnesses who had ever dealt with petitioner, that there never was any threat or suggestion of trouble from petitioner (R. 979, 986, 1000, 3131). There was no intimation anywhere in the proof that Jacocks thought petitioner was a bully. Nevertheless, the prosecutor was allowed to suggest (R. 3109-3110) that petitioner carried a gun, and was allowed to argue in summation that petitioner was handy with a gun (R. 3692). The Court below held that this was permissible, saying:

> "If a bully begins a negotiation by laying a firearm on the table, it is not relevant merely as such to negotiations with another person. But if later negotiations with the same person come in question and the issue includes the motives which actuated that person, it is highly relevant to show how the acquaintance began. That is too obvious to deserve elaboration."

The Court below apparently overlooked the fact, also, that Jacocks' motives were in no way involved.

> Question: Was the admission of the evidence error, and was it error to permit such use thereof?

(i) The essential means alleged for the carrying out of the alleged conspiracy was the conspirators' domination and control of the labor union. The petitioner offered to prove that at a time when his position and power in his local of the union had been impaired and suspended he

had sought the assistance of the alleged co-conspirators Browne and Bioff in his effort to regain his position and power, and such assistance and co-operation had been refused. The Trial Court refused to allow such proof.

> Question: Is it error to refuse to permit a defendant to offer such material and relevant proof upon a primary issue in the case?

(j) The Court below recognized that there never were any threats of violence; that the only threat was to call strikes. The Court below said (R. 4197):

> "As we have already said, he did not threaten them with violence; but the judge allowed the prosecutor to ask whether, when they paid the blackmail, they had been moved by fear of violence; and in a number of instances they said that they had."

> Questions: (1) Is it error to allow testimony that despite there was never any threat of violence, the "victims" mentally feared violence?
>
> (2) Is it error to allow such testimony of the undisclosed state of mind of the person addressed to add prejudicially to the language used so as to give a significantly different character to that language from its plain meaning?
>
> (3) Is it error to allow the jury to be influenced, by testimony of an undisclosed state of mind, to infer in the absence of any proof at all, or any implication in the language used, that the purpose of the threatener was to create the state of mind the "victim" now first claims was caused at the time?
>
> (4) Where, as here, the statute denounces the threat —not the state of mind induced thereby—may testimony of the undisclosed state of mind of the person threatened be accepted as proof of the guilty purpose of the threatener?
>
> (5) Most important of all, is the threat of a strike, unaccompanied by any threat of violence, such coercion as is contemplated by the act here in question?

4. As to the prosecutor's summation:

The petition here of the other defendants represented by Mr. Stewart presents questions concerning the prosecutor's summation. These questions are not here repeated, but it is requested that they be considered as though set forth. However, in considering these questions in respect of this petitioner it may be noted that whereas below the prosecutor sought to justify some of his statements on the ground that they had been evoked by the summation of counsel for the defendants, he can point to nothing whatever in the summation of this petitioner's counsel which could be said to furnish excuse.

Specifically relating to this petitioner these questions arise concerning the summation:

> Questions: (1) Where it is claimed that a defendant was brought into the conspiracy charged by another person not named in the indictment, is it proper for the prosecutor to ask the jury to draw an inference against the defendant because the alleged intermediary was not produced as a witness?
>
> (2) Where the Court ordered that a Government witness be taken into custody for perjury, is it proper for the prosecutor to urge the jury to accept the testimony of that witness? Furthermore, after the Court announced that the jury would be charged to disregard entirely the perjurer's testimony, is it proper for the prosecutor to suggest to the jury that nevertheless inferences could be drawn from the testimony?
>
> (3) Where the only testimony is purely hearsay, that one alleged conspirator, Nitti, indicated that he had some relationship with another person (Zwillman) not named as a conspirator, who was described in the hearsay, without other proof, as having some relationship with petitioner; and a third person (Buchalter—not named in the indictment) was quoted as having said that he would communicate with Zwillman, without any proof that he did, is it proper for the

prosecutor to argue and for the Court to state that there was proof of association?

(4) Where the relationship between petitioner and another person (Zwillman) was shown only by hearsay and even then as to any connection with this case, such hearsay concerned only future communication never shown to have been accomplished, is it proper for the prosecutor to argue that thereby connection had been shown and that the jury should convict petitioner so that, like Bioff and Browne who testified against the other defendants, petitioner might thereby be compelled to testify against Zwillman?

(5) Where there was no proof whatsoever that petitioner ever owned or handled a gun, is it proper for the prosecutor to argue that petitioner was "handy with a gun"?

(6) Where a Government witness was not permitted by the Court to state what another person, since deceased, had said to the witness (out of petitioner's presence), is it proper for the prosecutor to argue that inferences should be drawn against petitioner because petitioner's counsel had not waived the objection, and had not asked the witness what the conversation was?

5. As to the Court's charge:

(a) A number of questions concerning the charge have been stated in presenting the questions concerning the evidence. Other questions are presented by the other petitioners, represented by Mr. Stewart. It is respectfully requested that these be deemed to have been raised here by this petitioner, without necessity of repetition.

(b) In addition to the foregoing, the following question arises:

Question: Where the defendant did not testify and the Trial Court was asked (Request No. 23, R. 3755) to charge the jury that the "plea of not guilty served as his continuing denial of the evidence offered against

him by the prosecution pursuant to its ever-present burden of proof'' is it error to refuse so to charge?

6. As to severance:

Question: Under what circumstances and conditions is it improper to refuse a severance to one of a number of defendants?

7. As to venue and limitations:

The indictment set forth no act whatsoever alleged to have occurred in the Southern District of New York and within the jurisdiction of the Trial Court unless the charge that the defendants there conspired is so construed. While the indictment alleged that the conspiracy had been formed in the Southern District of New York, the proof and the prosecutor's theory both placed the formation of the conspiracy, if any, in the vicinity of Chicago, Illinois. There was no proof of any overt act within the Southern District of New York within the period of three years prior to the filing of the indictment.

Questions: (1) In a prosecution within the Southern District of New York where the only allegation of venue was that the conspiracy was formed in the Southern District of New York, may the prosecution be sustained upon the legal fiction that the conspiracy formed elsewhere was brought into the Southern District of New York by the commission therein of unalleged overt acts?

(2) Where the allegation as to venue is that the conspiracy was formed within the jurisdiction of the trial court, and no overt act is alleged, but the proof shows formation of the conspiracy outside the jurisdiction of the Court and there is no proof of any overt act within the jurisdiction of the trial Court within three years preceding the filing of the indictment, is prosecution in the district of trial barred by the statute of limitations (Title 18, U. S. Code, Sec. 582)?

(3) Is it error to charge the jury, as here and as approved by the Court below, that a defendant has the burden of proof of satisfying the jury that he has withdrawn from the alleged conspiracy before the Statute of Limitations begins to run? Does the burden of proof beyond a reasonable doubt—as distinguished from the burden of adducing evidence—ever shift in a criminal case?

8. Other questions, applicable to this petitioner as well, have been presented by Mr. Stewart in his petition on behalf of other defendants.

D

Reasons Relied Upon for the Allowance of the Writ.

Petitioner urges these reasons for allowing the writ:

I

The Court below dismissed as "trivial" and without other comment, petitioner's challenge to the indictment, in the light of the proof, because it had been made clearly to appear that the indictment falsely alleged as unknown the names of alleged co-conspirators and of an alleged victim of the conspiracy, and also because the indictment charged the formation of the conspiracy in the Southern District of New York, rather than in the vicinity of Chicago, Illinois, where it was actually claimed to have been made.

This case, therefore, presents the question whether grand jurors may violate their oath by falsifying the allegations of an indictment, to delude the defendants and to facilitate some ulterior purpose of the prosecutor.

It is the established rule, based upon the oaths of the grand jurors, that an averment in the indictment that the facts are unknown is presumptively true. *Coffin* v. *U. S.*, 156 U. S. 432. Where that presumption is completely over-

come, as in this case, it seems clear that the constitutional rights of the defendant have been invaded. It is not claimed, of course, that the names of all conspirators or of all victims must be set forth in the indictment. Nor is it argued that it is necessary to the sufficiency of the indictment that there be an allegation that the names are unknown. But if the allegation is made, it must be true. "A false averment in an indictment that names were unknown savors of trickery, and is most reprehensible." *State* v. *Smith*, 89 N. J. Law, 52, 97 Atl. 780.

"Where the name of the *particeps criminis* is in fact unknown to the grand jury, that body is justified by the necessity of the situation in stating that the name of such person is unknown to it; but a false recital of such fact is absolutely without legal justification." *State* v. *Faure*, 98 N. J. Law 18, 119 Atl. 4.

This is not a matter "concerned with the mere etiquette of trials and with the formalities and minutiae of procedure" (*Bruno* v. *U. S.*, 308 U. S. 287, 294). A right preserved by the Constitution is of a far "different order of importance."

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." *Boyd* v. *United States*, 116 U. S. 616, 635.

In *United States* v. *Riley,* 74 Fed. 210, the late Chief Justice Taft, then a Circuit Judge, dismissed an indictment for the offense of collecting political assessments from government employees upon the ground that the names of the persons from whom the assessments were received were alleged to be unknown to the Grand Jury; whereas the proof at the trial, which was the same proof that came before the Grand Jury, identified particular employees as having made payments. Judge Taft's opinion treats the question as one of variance, but makes it clear that the misstatements did not substantially affect the defendant's ability to prepare his defense. The decision was placed squarely upon the failure to comply with the constitutional requirement that the accused be informed of the nature and cause of the accusation.

II

The indictment was a paraphrase of the statute. It afforded the defendants no information of the precise nature of the charge they were expected to meet. Various motions for bills of particulars were denied. The Circuit Court of Appeals did not deign to notice the point. In formulating the rules which are to govern procedure in Federal criminal cases, it is respectfully urged that this Court may here find occasion to specify when, and in what circumstances and to what extent, a defendant may have particularization of an indictment, thus setting limits upon the exercise of discretion below.

This Court has said (*Glasser* v. *U. S.,* 315 U. S. 60, 66) that specificity of detail falls within the scope of a bill of particulars. It appears that in the Second Circuit, particulars cannot be obtained.

III

Testimony was admitted and permitted to be used against this petitioner, that at a time when the alleged conspirators were preparing to accomplish the election of Browne it was said that through one Zwillman they would enlist petitioner's support.

The language of the declaration itself shows that petitioner could not have been a party to the conspiracy at that time. Apparently it did not even look forward to making him a party, but merely assumed that he would take orders from Zwillman.

It was never shown that the request had been transmitted to Zwillman or, *a fortiori,* from Zwillman to the petitioner.

Testimony was admitted of other conversations among other people out of the presence of petitioner, which likewise were never shown to have been communicated to petitioner, but that detailed above is itself sufficient reason for the intervention of this Court.

The decision below is directly contrary to the opinion of this Court in *Glasser* v. *U. S.*, 315 U. S. 60.

The decision of the case at bar establishes a direct conflict between the Second Circuit and the Sixth Circuit which, in *Nibbelink* v. *U. S.*, 66 F. (2d) 178, reversed a conviction because of the presence of such evidence, although in that case there was ample proof that that appellant later became connected.

The opinion below is also in direct conflict with the opinion of the Eighth Circuit in *Morrow* v. *U. S.*, 11 F. (2d) 256.

There is likewise direct conflict with the Tenth Circuit, which in *Minner* v. *U. S.*, 57 F. (2d) 506 held such declarations admissible only upon independent proof that the person against whom they are to be used was a member of the conspiracy *at the time* the declarations were made.

In the case at bar, petitioner requested an instruction to the jury (Request No. II, R. 3785) that the conversations in question could not be considered as proof to connect petitioner with the conspiracy. This request was denied (R. 3737). The Trial Court charged the jury that the declarations were "*not alone sufficient to establish a connection.*"

The Court below ignored the fact that the jury was allowed to consider this evidence in determining petitioner's connection with the conspiracy, and treated the matter as though petitioner's complaint went only to the order of proof.

IV

The only direct evidence touching petitioner was the testimony of Bioff, the Government's principal witness, that petitioner was not a member of the conspiracy. The circumstantial evidence was as consistent with innocence as with guilt.

Petitioner recognizes that this Court will not be inclined to issue its process merely because a decision below was wrong, nor even merely to correct an injustice.

Nor is petitioner's plaint merely that the Court below was mistaken on the facts (*e. g.*,—it remarked that "Kaufman may have called strikes" when nothing could be clearer in the record than that he never did—never so much as suggested the possibility of labor trouble). So far as the facts are concerned, the point now made is that the inferences which the Court below indulged were too far-fetched to be allowed to remain as a standard of what may be tortured out of proof in a criminal case.

The Court below recognized that the payment of $15,000 made by Warner Bros. to petitioner in October 1936 was in point of time after all negotiations had been completed.

There were no conversations with petitioner in advance of the payment.

After the payment was made, petitioner is alleged to have said on several occasions that he had delivered the money to Bioff.

From the assumption that because petitioner had asked Bioff's help in getting a raise for his men and Bioff had spoken to Warner Bros. in that connection (incidentally, assuring Warner Bros. that Kaufman would not strike), the Court below jumped to the conclusion that the money "had been paid to avoid a break-down in the negotiations, and a consequent strike". It is submitted that the fact not only fails to support this inference, but is contrary to it.

The Court below then continued "If in addition to this, Kaufman told the truth when he said that he had paid the whole amount to Bioff, no other conclusion was possible than that he was a party to the general conspiracy. Obviously, he would not have done so, unless he expected some equivalent, either by way of profit or of immunity. There may be honor among thieves, but there is no maudlin munificence".

Here again the gap between fact and inference is too wide for spanning. (The Court below assumed that Bioff had denied receipt of this money from Kaufman, but the record is clear that there is no such denial.)

Since Bioff was the *de facto* head of the Union in which petitioner was a local official, it is certainly as reasonable to suppose that petitioner dealt with him as such, rather than as a representative of a subterranean conspiracy of which petitioner was never shown to have had any knowledge. In this situation, petitioner may have been doing no more than his duty, not indulging in any "maudlin munificence".

In this respect, the opinion below is in direct conflict with the decisions in the Third Circuit in *Grant* v. *U. S.*,

49 F. (2d) 118 and *Graceffo* v. *U. S.*, 46 F. (2d) 852; the Fifth Circuit in *Kassin* v. *U. S.*, 87 Fed. (2d) 183; the Sixth Circuit in *Tucker* v. *U. S.*, 224 Fed. 833; the Eighth Circuit in *Dahly* v. *U. S.*, 50 F. (2d) 37 and *Salinger* v. *U. S.*, 23 F. (2d) 48; and the Ninth Circuit in *Terry* v. *U. S.*, 7 F. (2d) 28.

In all these other circuits it has been held that circumstances consistent with any reasonable theory of innocence are insufficient to support an inference of guilt.

Certainly the circumstance is susceptible of other inferences than that petitioner was a member of this conspiracy. That being so, the decision below conflicts with the decision of the Eighth Circuit in *Turinetti* v. *U. S.*, 2 F. (2d) 15, 17, that such a circumstance is "robbed of all probative value".

The Court below drew a further conclusion: "When Kaufman said he had paid it, he was saying in substance that the money had been collected for Bioff, and he could not have been unaware that Bioff was not acting for himself". It is submitted that no basis is shown for the supposed awareness. There was no evidence to show that Kaufman had any idea that Bioff had any associates, or was acting for anybody else. Then the Court below added a further inference, that Kaufman was "therefore acquainted with the conspiracy".

It is respectfully submitted that this series of inferences, one built upon the other, is contrary to the decision of this Court in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703. See also, *U. S.* v. *Ross*, 92 U. S. 281, 283-4.

Certainly the Court below had no right to indulge in any inference of knowledge, because knowledge must be proved and not merely inferred. But even more certainly, before any such inference could ever be considered it is at least required that the jury should have been charged meticulously upon the subject and specifically cautioned against

being prejudiced by the mass of evidence against other defendants which had been put forward in the eleven weeks of trial. Instead, the charge, so far as it touched the matter of knowledge at all, was in general terms, unrelated to the facts in evidence and altogether inadequate to prevent confusion in the jurors' minds (*cf.* dissenting opinion of Frank, J., in *U. S.* v. *Liss*, 138 F. (2d) 995, 1003).

Moreover, it is not within "proper standards for the enforcement of Federal Criminal law" that the Court below, in holding that the jury could have inferred connection from circumstantial evidence, ignored the fact that the jury was permitted to consider the hearsay testimony *along with* that evidence. Even if there were room to indulge the inferences drawn by the Court below, it cannot be said that the jury did so. They may have used the hearsay in determining whether petitioner was connected, as, under the Trial Court's charge, they were quite at liberty to do.

V

The Court below held that there was properly submitted to the jury testimony that petitioner in January, 1942, made a statement at a meeting, that some people in the room wanted to have him in jail, but he would not go to jail; that he would be there and alive when the others were dead and that they would not die a natural death.

Passing the point that it was conclusively demonstrated by petitioner in his defense that the statement had no possible reference to the case at bar, it is urged that the Court below was in error in holding that it was laudable to prejudice Kaufman by such testimony, regardless of its truth, because it was susceptible of being understood as a threat against those who might testify against him.

The Court below completely ignored the fact that the prosecutor made no attempt whatever to associate the

statement with the case at bar. Its only possible relevancy was upon the theory of spoliation of evidence, but to qualify on that theory it must appear to have direct connection with the case on trial. 16 C. J. 555, 556, Sec. 1075; *Wigmore on Evidence*, 3d Ed., Vol. II, Sec. 277; *Jones on Evidence*, Sec. 83. See also, *Bryant* v. *Stilwell*, 24 Penn. 314, 318.

The Court also permitted testimony that on an occasion in 1932, long prior to the enactment of the statute on which this prosecution was founded and long prior to any possible conception of the conspiracy charged (regardless of the date of that statute), another union official, in the presence of Kaufman, had placed a gun on a table while talking to an official of Warner Bros. There was not the least intimation that it was done to cause fear, or for any ulterior purpose. (This incident was the basis for the prosecutor's statement in summation that *petitioner* was "handy with a gun".)

The Court below held this evidence admissible by assuming, contrary to the clear fact, in series (1) that petitioner was a bully, despite proof by the prosecution's own witnesses that he had never made any threat of any kind under any circumstances, and had never "bullied" anybody, and (2) that petitioner had demanded money from the witness Jacocks. The Court below said that the relevancy was "too obvious to deserve elaboration". If the unfounded assumptions are deleted, it seems too obvious that there was no possible relevancy to this conspiracy, particularly since it was not even charged that petitioner had any "bullying" function to perform.

The petitioner's character was not in issue.

The ruling below, therefore, appears to be directly contrary to the decisions in this Court in *Boyd* v. *U. S.*, 142 U. S. 450, and *Byrd* v. *U. S.*, 180 U. S. 356. It is in direct conflict with the decision of the Fifth Circuit in *Railton* v. *U. S.*, 127

F. (2d) 691 and the Sixth Circuit in *Eley* v. *U. S.*, 117 F. (2d) 526.

VI

The prosecution contended, as the indictment charged, that the means by which the conspiracy operated was the control of the IATSE and its various locals.

Petitioner offered to prove (R. 3079-3081) that in January, 1936, petitioner's local was in the hands of a Receiver under a decree of the Chancery Court of New Jersey; that it was unable for that reason to undertake wage scale negotiations for its members; that the decree had other far-reaching effects touching the IATSE; that petitioner sought the assistance of the General Executive Board of the IATSE in contesting the decree of the Chancery Court; that such Executive Board authorized Browne to furnish assistance; that Browne gave no assistance of any kind.

The proffered evidence went to the heart of the question of control of the Union, because it would have shown that Browne and Bioff, with power so to do, did nothing whatever to assist Kaufman in regaining some measure of control of his own local.

The evidence was excluded.

The Court below ignored the point.

The decision in the case at bar seems to be directly contrary to the opinions of this Court in *Edwards* v. *U. S.*, 312 U. S. 473, 482 and *Crawford* v. *U. S.*, 212 U. S. 183, 203.

VII

The prosecutor's summation was uninhibited by any restraining influence of the Trial Court. On the contrary, the remarks of the Trial Court when objections were made, amplified the prejudice of the prosecutor's statements.

Thus, the prosecutor was allowed to say, in the absence of any proof thereof, that there was proof of association

between Zwillman and the Chicago defendants, and to ask the jury to draw an inference against petitioner because Zwillman and Buchalter were not produced as witnesses.

The prosecutor was allowed to ask the jury to convict petitioner so that he might thereby be constrained by the conviction, as had Bioff and Browne in the case of the Chicago defendants, to become a Government witness so that Zwillman could be prosecuted. A requested instruction (Supplemental Request, R. 3790) that the jury disregard this argument, was refused (R. 3737) and its substance was nowhere charged.

Although petitioner's counsel had pleaded with the Court to refuse to allow the witness Roach to testify (R. 2335-2337 and 2361-2362) and although thereafter Roach's perjury was demonstrated beyond doubt (R. 2953-2954) the prosecutor at first sought to have the jury credit Roach's testimony, and when the Trial Court announced that the jury would be instructed to disregard Roach's testimony entirely, the prosecutor sought to have the jury draw an inference that Roach had been planted by the defense (R. 3626-3629). He deliberately distorted the efforts of petitioner's counsel to demonstrate Roach's perjury (R. 2882-2889).

There are many other transgressions. Some have been printed in Mr. Stewart's brief on behalf of other petitioners in this case and in an appendix thereto.

The ruling of the Court below that the prosecutor's conduct was within "permissible limits" seems to be directly contrary to the ruling of this Court in *Berger* v. *U. S.*, 295 U. S. 78, 89.

VIII

None of the defendants testified. The Trial Court was asked (Request No. 23, R. 3755), to charge the jury that a "defendant's plea of not guilty serves as his 'continuing

denial of the evidence offered against him by the prosecution pursuant to its ever-present burden of proof.' " This request was denied (R. 3736). The Court below ignored the point.

This appears to be in direct conflict with the ruling of the Third Circuit in *U. S.* v. *DeAngelo*, 138 F. (2d) 466, 469.

IX

It is, of course, elementary that Federal Courts being of limited jurisdiction, venue must be made affirmatively to appear. In the case at bar the only allegation of venue is that the conspiracy was formed in the Southern District of New York. If this be treated as an allegation of fact, then the indictment clearly should have been dismissed for failure to prove venue, since there can be no doubt that the proof showed—and the prosecutor so argued—that if there were any conspiracy it was formed in the vicinity of Chicago, Illinois.

If, on the other hand, the allegation is treated as a conclusion of law based upon the legal fiction that the conspiracy was brought into the Southern District of New York by the commission therein of an overt act, then it would seem that at the least there should have been some identification, if not specification, of such overt act. Of course, no overt act is alleged.

The point now presented does not seem to have been passed upon before, and it was dismissed without mention by the Court below, under the general characterization of all attacks upon the indictment as "trivial".

(Of course, the decision in the case at bar was only two days after the decision of this Court was published in the case of *U. S.* v. *Johnson*, No. 43, October Term 1944, decided December 18, 1944.)

It is respectfully submitted that if the indictment could be found and tried in the Southern District of New York predicated upon this conclusion of law, in turn based upon a legal fiction, then it was at least requisite that the prosecution show affirmatively the commission of an overt act within the Southern District of New York within three years prior to the filing of the indictment, even though none at all had been alleged.

Mr. Stewart on behalf of other petitioners has presented the question and has argued the point, which petitioner begs leave to adopt by this reference, that the Court below erred grievously in holding that the burden of proof was upon the defendants to establish withdrawal from the conspiracy more than three years prior to the filing of the indictment.

But beyond that point, it is submitted that the legal fiction by which a conspiracy is brought within a state other than the one of origin, cannot be indulged in the case of a conspiracy which is a complete offense as soon as formed, unless that legal fiction is maintained by proof of an overt act within the district of trial within the period of limitations. Or, in other words, if the conspiracy is brought into the trial district only by overt act, it does not stay there after overt acts in that district cease.

Here there were no overt acts in New York within three years prior to the filing of the indictment.

X

The crime denounced by the statute here involved is the threat to use "force, violence or coercion." Here, as noted by the Court below, the only threat was to call a strike. Neither force nor violence was threatened.

That the "victims" later claimed that this threat caused fear of violence seems immaterial for two important reasons: (1) That fear was never said to have been made

known to any of the alleged conspirators, not even the accomplice witnesses. (2) This Court in *U. S.* v. *Local 807, etc.*, 315 U. S. 521, has said that the conduct of the accused must be judged only by what he or they did—not by what the employers thought.

Thus this case directly presents the question whether in the light of its legislative history, the doctrine of *noscitur a sociis* applies to the interpretation of this statute, and so whether the word "coercion," held by the Court below to include in its meaning the bare threat of strike, without threat of any violence, is that broad in its scope; or whether it is necessarily limited by the companion words "force" and "violence" to mean compulsion by strong-arm methods.

XI

As with the Questions Presented, petitioner prays that there may be considered as though incorporated herein at length the several reasons for allowing the writ not otherwise referred to herein which are set forth in the petition of Compagna, et al., filed on their behalf by Mr. Stewart.

Questions of law applicable to all the petitioners have been discussed in Mr. Stewart's Brief in support of his petition. In the foregoing specification of reasons, this petitioner has in the several points referred to pertinent authorities. Accordingly, no separate brief is filed in support hereof since the subjects seem adequately covered without further burdening the Court.

E

Conclusion and Prayer

Amazing though it may seem that all these divagations should have occurred in one case, it is apparent that it was the result of the determined effort of the prosecutor

to augment the inadequate proof by resort to doubtful and dubious means.

If it seem astounding that the Court below could have tolerated and condoned these devices, perhaps the explanation may be found in that Court's expressed belief: "The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence."

The Court below failed to recognize that such departures from proper standards and the accepted course of judicial proceedings were a far greater stain.

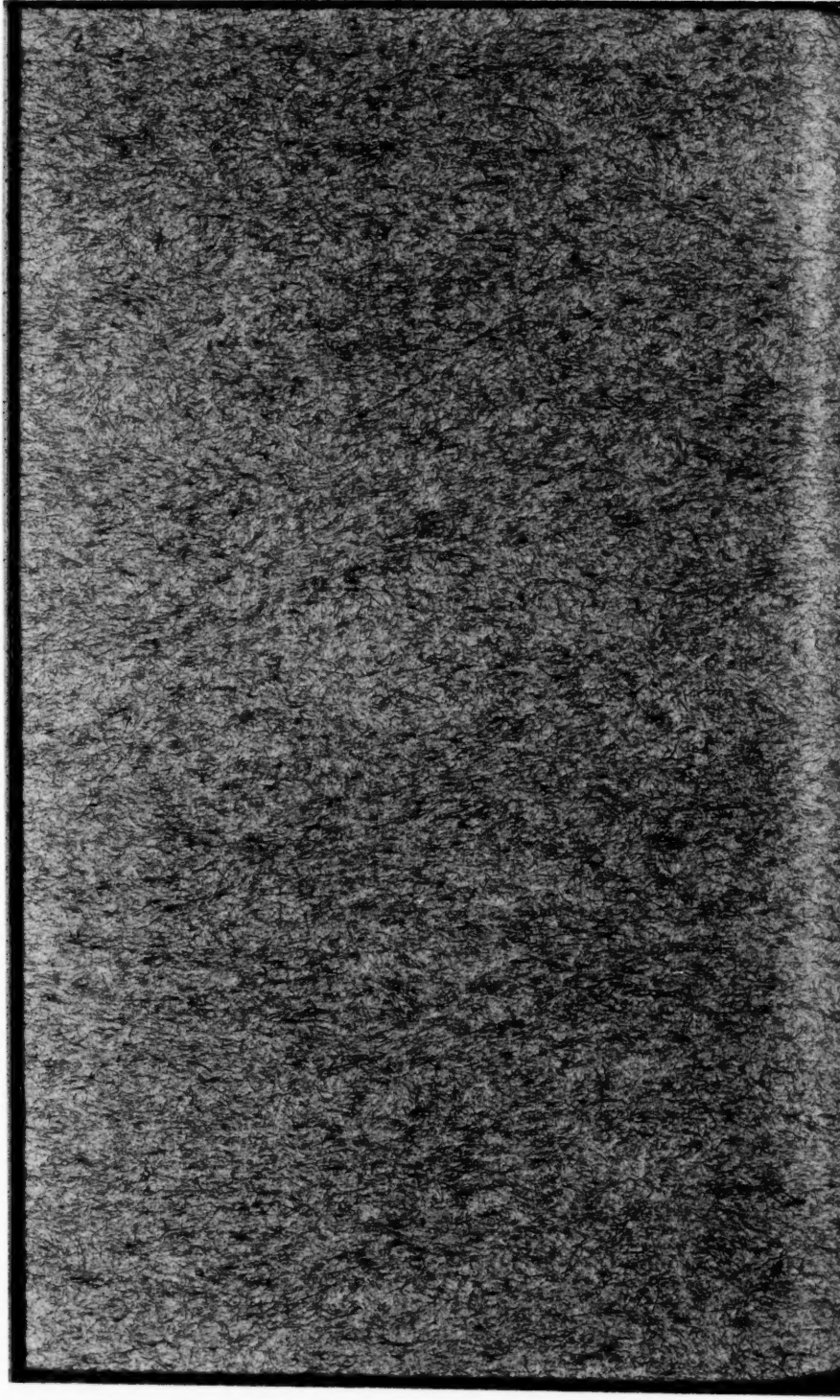
WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment against petitioner in this case may be reversed; and that your petitioner may have such other relief as this Court may deem appropriate.

And your petitioner will ever pray, etc.

Dated: New York, N. Y., February 12, 1945.

LOUIS KAUFMAN,
Petitioner,

By J. BERTRAM WEGMAN,
HAROLD SIMANDL,
Counsel for Petitioners.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 935

LOUIS COMPAGNA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 942

FRANCIS MARITOTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 946

LOUIS KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 4191–4201) is reported in 146 F. 2d 524.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 11, 1945. Petitions for rehearing were denied on January 8, 1945 (R. 4202–4204). The petitions for writs of certiorari were filed on or before February 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the indictment and the proof with respect to venue and knowledge by the grand jury of persons referred to in the indictment as unknown.

2. Whether in a prosecution for conspiracy to violate the Anti-Racketeering Act by extorting funds through fear of violence, it was prejudicial error to permit testimony by the payors as to the motives that induced them to make the payments.

3. Whether the summation of the prosecutor was improper.

4. Whether the trial judge failed properly to instruct the jury in respect of (a) the statutory exemption in favor of bona fide union activities, (b) interstate commerce, (c) the statute of limitations, and (d) the effect of a plea of guilty; and (e) whether the judge committed reversible error in referring to petitioners' right of appeal.

5. Whether the judge's statement to the jury, made out of the presence of counsel, that he would read requested evidence to them after lunch constituted a private communication requiring reversal of the convictions.

6. As to petitioner Kaufman, whether the evidence was sufficient to support his conviction; and whether there was error in admitting evidence against him and rejecting evidence offered in his behalf.

STATUTE INVOLVED

The Act of June 18, 1934, c. 569, 48 Stat. 979 (18 U. S. C. 420 (a), (d)), provides in pertinent part as follows:

> SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

* * * * *

SEC. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided,* That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of New York upon a single count charging a conspiracy under the Act of June 18, 1934, commonly known as the Anti-Racketeering Act, to obtain by force, violence and coercion, in connection with acts af-

fecting interstate and foreign trade and commerce, the payment of upwards of $1,000,000 from a group of persons and corporations in the motion picture industry.

In substance, the scheme alleged was one to dominate and control the International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada, a labor union (referred to throughout the record and herein as IATSE), and through such control to extort from the industry for the defendants' and co-conspirators' own use and benefit the substantial sums charged. The indictment alleged that such sums were to be paid for "protection," namely, to dissuade and prevent the confederates from obstructing the production, distribution and exhibition of motion pictures throughout the United States and otherwise injuring and destroying the business of the victims. None of the defendants, except petitioner Kaufman, was alleged to have had any official connection with the union. The co-conspirators George E. Browne, William Bioff and Nick Circella, however, named but not indicted,[1] were described as officials and petitioner Kaufman as business agent of Local 244 of the IATSE (R. 4–6). The defendant Nitto died of a "bullet wound of head" on the day of the filing of the indictment and the case was severed and

[1] Browne, Bioff and Circella were previously successfully prosecuted for the same offense.

nolled as to him (R. 9–10). The court dismissed the indictment against Pierce, another defendant, and the remaining seven were convicted by the jury (R. 3793). Petitioner Kaufman was sentenced to imprisonment for seven years and to pay a fine of $10,000 and the others were each sentenced to imprisonment for ten years and to pay a fine of $10,000 (R. 4026–4032). On appeal the judgments were affirmed (R. 4202–4204).

The evidence for the Government may be summarized as follows:

Prior to 1932, the co-conspirator Browne, a former stage hand in Chicago, had been the business agent of the Chicago Local and an international officer of IATSE (R. 1015–1017). In 1932 he ran for international president of the union but was defeated (R. 1018). Shortly thereafter he met the co-conspirator Bioff, who knew and had worked in various illicit enterprises for some of the defendants (R. 1021, 105–108). Bioff and Browne formed an association and divided between themselves Browne's income, partly legitimate and partly illicit (R. 114, 116, 122, 1023, 1028).

Browne and Bioff spent considerable money at a night club owned by the co-conspirator Circella, alias Nick Dean (R. 122–124, 1029) and apparently attracted attention to themselves for they subsequently were summoned separately before one Frank Rio (deceased prior to the indictment) (R. 125–126, 129, 1031–1032), one of the

leaders (R. 129) of a group of underworld characters in Chicago, including petitioners Compagna, deLucia, D'Andrea, Maritote, Gioe, and the late Frank Nitti, who referred to themselves as "the outfit" (R. 182, 193, 324, 325, 915, 1043, 1044, 1132). As the result of Rio's terse conversations (R. 130–134, 1032–1033) Browne and Bioff agreed to pay to the "outfit" one-half of all the two might collect from the motion picture industry (R. 130–132, 1044). In early 1935, after some money had been extorted, as hereafter described, Browne and Bioff were again summoned before the heads of the "outfit," including Compagna, deLucia and Nitto. On the claim that they had a large organization, "a big family," and needed money, the distribution ratio was revised upwards, the "outfit" taking two-thirds of the prospective spoils, and leaving one-third to be divided between Bioff and Browne (R. 181–183, 1053–55). This latter proportion continued throughout the conspiracy.

Between March and May 1934, shortly before the biannual IATSE convention at which officers were to be elected, the "outfit" heads had several meetings with Bioff and Browne at Riverside, Illinois, to formulate plans for their future operations. Among those present were petitioners Compagna, deLucia, Circella, Rio, Nitto (R. 136, 141, 1036–1038) and, on one occasion, one Louis "Lepke" Buchalter (R. 141). They discussed prospects of making a million or two million dol-

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lars (R. 1039); their relationship as a partnership; the necessity for Bioff's and Browne's loyalty; and the penalty if Browne and Bioff were "caught wrong" (R. 138). They planned the condition precedent to the success of their schemes, namely, the engineering of Browne's election as international president of the IATSE, and agreed to utilize the "outfit's" nation-wide connections to elect Browne president (R. 139–145, 1037, 1039). Arrangements were made to send certain members of the "outfit" to the convention to see that the persons so reached lived up to their commitments (R. 144, 1039–1040). In this connection the names of petitioner Kaufman and one Abner "Longie" Zwillman were brought into the picture: at one meeting, Nitto stated that they would "take care of Jersey through 'Longie' Zwillman," their "contact" in that state (R. 140); and, at a later meeting, when ordered by Nitto to get in touch with Charles "Lucky" Luciano and inform him that Local 306 of New York was to vote for Browne, Buchalter replied, "I don't have to see Lucky on that, Frank, I handle that myself, I will take care of it; I will also see Kaufman of Jersey, I will see 'Longie' and see to it that 'Longie' delivers Kaufman" (R. 145).

In June 1934 at the IATSE convention in Louisville, Kentucky, Browne was unopposed and unanimously elected international president (R. 146, 1041). Members of the "outfit," including

petitioner Maritote and Louis Buchalter, attended as planned, and found relatively little to do except to "make themselves conspicuous" (R. 145–146, 1058, 2067–2070, 3134). Their hotel bills were paid by the union (R. 1041, 2037–2038).

Shortly after the election of Browne, a further meeting was held at Riverside attended by petitioners Compagna and deLucia. Instructions were given to Bioff and Browne that Circella was to attend all their meetings with persons in the industry and was to be kept informed of all developments (R. 149, 1042). Bioff and Browne were told, "We ought to get ourselves organized and start getting some dough" (R. 149).

Thereafter, in a matter of months, the "outfit" acquired direct control of Chicago Local 110 of the IATSE. In February 1935 one Maloy, business agent of Local 110, was assassinated and thereupon Browne, against his will but at the command of the "outfit" transmitted through Circella, placed the local under international rather than autonomous supervision (R. 159, 1050–1051). Between February and December 1935, Circella ran the affairs of Local 110 (R. 233–234). Thereafter, and continuing as late as May 1942, the local had two successive business agents over whom the "outfit" maintained rigid control and who, with their assistants, were required to divide their salaries ($400, $250, $175 per week, respectively) with the "outfit" (R. 2207–2210, 2215, 2228–2229). The

control by the "outfit" was so rigid that Browne was unable to abolish the so-called "permit system" in Local 100 because Compagna refused to grant him permission to do so (R. 1103–1106).

Rio, one of the "outfit's" chieftains, directed Bioff to threaten to double the number of operators working in projection booths in theater chains in Chicago, stating that this threat would undoubtedly result in "some money coming up" (R. 166). By yielding to threats on the part of Bioff (R. 168–180, 352) the industry in Chicago paid over $100,000 in 1935 and tens of thousands of dollars annually in subsequent years. These payments were made to Bioff and Circella as late as December 1940 (R. 262, 330–331, 1722–1728). Among theater operators in Chicago was one Barger who owned the Rialto Theater which alternated the showing of motion pictures with stage shows and dealt with both stage hands and operators locals of the IATSE in Chicago. The motion pictures shown in the theater represented the products of all major companies (R. 2110, 2115). Beginning in April 1935 under repeated threats by Bioff to close Barger's business, the "outfit" secured a 50 percent interest in the theater's profits, amounting ultimately to $35,200 (R. 2121, 2130, 2132). The money was delivered by Bioff to deLucia and Compagna at different times (R. 296–297). In the fall of 1935 it came

to the attention of Nitto, deLucia, Compagna and others of the "outfit" that Barger was drawing a personal salary of $200 per week. Thereupon, pursuant to instructions of the "outfit," an ultimatum was transmitted to Barger that "unless one of our boys were put on the pay roll for $200 a week, he could not operate that theater" (R. 299–302, 304). Over a vehement protest, Barger complied (R. 304, 2122–2123). Petitioners Maritote (referred to in the record as Diamond) and D'Andrea, successively, were designated by Circella to fill this "position" (R. 304–305, 2133). Maritote was paid $175 [2] per week in currency, totaling $13,650 (R. 2125–2127). D'Andrea took his place and received $48,109.25 (Ex-34, R. 3880–3883). Neither performed any services in return for such payments (R. 2134, 2143).

In the early fall of 1935 the "outfit" extended its operations to the city of New York where a labor controversy was pending between the New York local of the IATSE and the exhibitors. After being exposed to sabotage in the theaters (R. 1466–1467), the local representatives of theater operators collectively paid $150,000 to Bioff and Browne through an intermediary (R. 196–201, 1062–1064). No assurance was ever

[2] During the time that Maritote and D'Andrea were paid $175 per week, D'Andrea's sister was placed on Barger's pay roll at $25 per week; when she left, D'Andrea, at Circella's insistence, was "raised" to $200 per week (R. 2136–2138).

given that this money was to go to the union (R. 202).

In 1936 petitioners' activities were extended to the producing units of the industry. At the time of Browne's election in 1934, the IATSE controlled only motion picture machine projectionists and stagehands in theaters. In November 1935, by calling a successful strike on hundreds of Paramount houses located in the Middle West, and under threat by Browne to order a strike on all theaters owned by producing companies, the IATSE after a meeting of interested parties at the Union League Club in New York, was given the control of studio workers and a closed shop on the West Coast (R. 1083–1084, 1333–1337). Using the power acquired over both the exhibition and the production ends of the industry, substantial sums were demanded from the producers. Bioff told the producers that unless payment was made "we will close every theater that is owned by the affiliated companies" and reminded them of the 1935 strike (R. 1340–1341, see R. 1343, 1549, 1811). It was emphasized, however, that these demands had nothing to do with the wage scale or any of the other open negotiations since the men of the union had to be paid and paid well (R. 1811; see R. 1347). At first $2,000,000 was demanded, subsequently $1,000,000, and later, the sum demanded was fixed at $50,000 per annum for

the large producing companies and $25,000 per annum for the small companies (R. 1094, 1340–1344, 1548–1550, 1614–1615, 1806–1812).

As the result of these "negotiations," four large motion picture producing companies paid Bioff some $400,000 in 1936, 1937 and 1938 (R. 224–229, 740, 746; 1347–1349, 1550–1556, 1815–1822). By a complicated arrangement whereby the "outfit" became the recipient of a commission in the purchase of raw films, payments from one of the producing companies continued until May 1941 and totaled an additional $236,469 (R. 264–265, 1349–1355, 1477–1489, 1497–1506).[3]

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[3] With regard to collections, proof in record concerning payments by producing and exhibiting theater companies shows the following sums to have been paid to Browne, Bioff, Circella, Maritote, D'Andrea, Kaufman and associates:

Description	*Amount*	*Record*
Collections from theater companies (Chicago area).	$290,059	171, 173, 330, 331, 354, 1718, 1719, 1721, 1726, 2121, 2127, 2130, 2133, Ex. 34, 3879.
Collections from theater companies (New York area).	150,000	200, 476.
Collections from theater companies (Newark area).	20,500	995, 965–6, 969, 970, 1003–1004, 1006, 1008.
Collections from theater companies (California area).	25,000	354–355.
Collection through commissions on film purchase contract.	236,469	264–265, 1349–1355, 1477–1489, 1497–1506.
Collection from producing companies.	400,000	224–228, 229, 740, 746.
	1,122,028	

Petitioner Rosselli was introduced to Bioff as the "outfit's" representative on the West Coast whose function was to supervise the activities of Bioff and Browne in that area (R. 153, 824). On direction of Nitto (R. 212, 829), Rosselli was placed "on the pay roll," at first being paid $150 per week by padding union pay rolls (R. 245) and later $194 a week out of extorted funds (R. 292, 834–843). Rosselli, who performed no services for the union for this stipend (R. 249, 1892), knew the source of the monies which were paid to him (R. 355–356). He discussed with Compagna and Bioff the failure of one of the proposed victims to pay (R. 279) and generally participated and maintained the "outfit's" interests whenever it was necessary (R. 249–252, 336–339, 1891–1896). In all, between 1936 and 1941, illicit payments to Rosselli totaled approximately $50,000.

Charles Gioe (referred to in the record as Joy) appears in a slightly subordinate capacity to the heads of the "outfit," being identified with Compagna and deLucia as one of those to whom Bioff delivered the "outfit's" share of the money obtained by Bioff (R. 180, 299). He attended meetings of the chieftains of the "outfit" in Chicago (R. 259, 316, 2040), directed Bioff in respect of his relations with the union (R. 316–317), and was to be the beneficiary of an attempted seizure by the "outfit" of the Actors

Union which Gioe stated was to be his "organization" (R. 326). He attended conventions of the IATSE apparently as a representative of the "outfit" (R. 241–243, 1108, 1127–1128, 2220), and generally supervised their interests in thwarting an attempted withdrawal by Bioff from the conspiracy[4] and in attempting to pervert and obstruct the investigation and prosecution of the "outfit" (R. 345–347, 770, 1132–1133, 2225–2226).

Petitioner Kaufman was business manager of Local 244 of the IATSE which had a contract with Warner Bros. in northern New Jersey, expiring September 1, 1936 (R. 951–953). In 1932, shortly after the appointment of Jacocks as zone manager for Warner Bros. in the Newark area, Kaufman, Oppenheim, and Gehring introduced themselves to him and assured him it would be "good business" for him "to get along with them." During the conversation Gehring put a revolver on Jacocks' desk (R. 952–953). Begin-

[4] In the summer of 1940, Gioe informed Bioff that it was the order of the "outfit" that Circella resign his connection with the IATSE. Bioff replied that if Circella was to resign, he and George Browne would also quit (R. 331–332). The following day Gioe returned with Compagna. Bioff's testimony concerning this incident is as follows: "Compagna said, 'I understand from Charley (Gioe) that you told him you were going to resign; is that right?' I said, 'Yes, sir.' He says, 'Well, anybody resigns resigns feet first.' He said, 'You understand what that means.' I says, 'I do.' He says, 'Now go ahead,' and that was the end of it, and I didn't resign" (R. 332).

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ning in August 1936, a number of conferences looking to a new contract were held in Newark and New York City between Jacocks and Morgenroth, respectively, zone manager and labor relations man, representing Warner Bros., and a wage scale committee, Kaufman and two other officers (Oppenheimer and Gehring) representing the union (R. 953–954). The wage scale committee dropped out during the negotiations and in early October a final agreement was reached orally with Kaufman and his co-officers alone (R. 954). While the conferences were in progress, Kaufman complained to Bioff that he was having trouble in the negotiations and asked for his "help" (R. 254). Bioff then went to one Phelps, a "labor contact man" for Warner Bros., who told him Kaufman was unreasonable and threatened to strike and that Phelps was looking to Bioff "to see to it that we get straightened out" (R. 255). Bioff answered that he would not let Kaufman strike (under the IATSE constitution only Browne could authorize a strike) but advised Phelps to "get straightened out with Kaufman even if it costs some money" (R. 945). On October 26, 1936, after a contract had been verbally agreed upon, Jacocks was summoned to Warner Bros.' New York office where, after conversing with one Willard Patterson, who was in charge of company labor relations nationally,[5] Jacocks was

[5] Patterson had died before the trial (R. 955).

given $15,000 in currency which he brought to Newark and which Morgenroth delivered to Kaufman on the following day (R. 954–957, 1003–1004). Morgenroth asked Kaufman whether he had to "split that money with any of the other fellows" and Kaufman replied, "No; they know nothing about it. I don't get a cent of this money. I have to go across the river" (R. 992). Later Kaufman told Jacocks he "had to take that money over the river and turn it over and he did not get any of it" (R. 959). The money was paid before the new contract, orally agreed upon, was signed (R. 987).

The 1936 contract expired at the end of August 1939. Negotiations for a new contract were opened and conferences held as in 1936, the parties being the same except that Kaufman alone represented the union after the wage scale committee had retired. In these proceedings Kaufman demanded $10,000 and told Jacocks that he had to pay to Bioff the whole $15,000 received in 1936. After consultation with his New York superiors, Jacocks informed Kaufman they would only pay $5,000 in two installments, to which Kaufman agreed, and upon payment of the first $2,500 in currency in 1939, the new contract was signed (R. 966–970, 993–995, 1007–1008). The second $2,500 installment was paid in currency in August 1940 (R. 970, 1008). Thereafter, in conversation with Morgenroth, Kaufman repeated that he had not received any of the original $15,000

but had to turn it over to Bioff, expressing the opinion that he had told Morgenroth so previously (R. 996). In 1937, Kaufman also received $500 in currency from Warner Bros., in connection with employment of standbys, after he had demanded $1,000. In collecting the money, Kaufman refused to accept a check to his order (R. 962–966, 992–993, 1004–1007; Ex. 8, R. 3858).

Bioff testified that when he learned of the $15,000 collection, not having received it from Kaufman, he protested to Nitto requesting instructions as to whether to see Kaufman and get some of the money; that Nitto's reply was, "No, don't bother Louis, he is Longie's (Zwillman's) man, and just leave it alone" * * * and that Kaufman was not bothered (R. 256–258).[6]

ARGUMENT

1. Petitioners contend (C. Pet. 12, 20, 23, 24, C. Br. 3, 5–7, 14–31; K. Pet. 9–10, 10–22, 31–32) [7]

[6] Jacocks testified that Kaufman occasionally referred to Zwillman as "the big boss" (R. 971). Morgenroth observed Zwillman and Kaufman at luncheon with Oppenheimer and Gehring, the two Local 244 officials who participated with Kaufman in the 1936 contract negotiations after the union's wage scale committee had dropped out (R. 977); and Flaherty, a Warner Bros. employee who participated as payor or witness in all four payments to Kaufman, was introduced to Zwillman by Kaufman at a Local 244 dinner in Newark (R. 1008–1009).

[7] The petition and brief filed on behalf of petitioners Compagna, et al. are referred to as C. Pet. and C. Br. respectively. The petitions filed on behalf of petitioners Maritote and Kaufman are referred to as M. Pet. and K. Pet., respectively.

that there was a fatal variance between the indictment and proof in respect of venue and the knowledge by the grand jury of persons referred to in the indictment as unknown.

(a) *Venue.*—The indictment alleged that from June 18, 1934, and continuously thereafter in the Southern District of New York the petitioners and their confederates conspired to violate the statute (R. 4–6). The proof shows that the initial agreement by which the "outfit" planned to dominate the union and to secure the election of Browne as president occurred in Chicago in 1934 and that it was not until 1935 that the conspirators extended their operations to New York (see *supra,* p. 11). The proof does, however, establish numerous acts of the conspirators committed in the Southern District of New York, including measures of great importance to the extension of the conspirators' power over the movie industry. Thus, the Union League Club meeting by which the IAT regained its status among the Hollywood studio workers, the obtaining of the $150,000 from the New York theater operators, the negotiations for payments of large sums by the producing companies, and a major portion of such payments by the producing companies, all took place in the Southern District of New York (see *supra,* pp. 11–13).

The venue of this action was therefore properly laid in the Southern District of New York. Sec-

tion 6 of the Anti-Racketeering Act specifically provides:

> Any person charged with violating Section 420 (a) of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators—

The same rule applies in the absence of a venue provision. *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 252; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402–403. Since a continuing conspiracy, such as was here proved, "is in effect renewed during each day of its continuance", *United States* v. *Borden Co.*, 308 U. S. 188, 202, the indictment properly charged that petitioners and their confederates "conspired" in the Southern District of New York. See *Hyde* v. *United States*, 225 U. S. 347, 367, where this Court rejected the same argument that petitioners make here that an allegation of conspiracy within the district was not supported merely by proof of overt acts within the district. The only variance between the indictment and the proof was the variance in the date on which the conspiracy commenced to operate in the Southern District of New York, clearly an immaterial element. *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *Hood* v. *United States*, 23 F. 2d 472, 475 (C. C. A. 8), certiorari denied, 277 U. S. 588.

Contrary to petitioner Kaufman's contention (K. Pet. 19, 31–32), there was proof of an overt act within the Southern District of New York during the three-year period prior to the return of the indictment, although other overt acts were stressed by the prosecution as showing the existence of the conspiracy within the period of limitations. In the summer of 1942 petitioner D'Andrea, within the Southern District of New York, questioned the witness Barger as to his testimony before the grand jury (R. 2143–2145). That this was during the life of the conspiracy is shown by the fact that subsequently D'Andrea attempted to secure further funds from Barger, taking Ralph Capone with him to enforce his demands (R. 2148–2150), and that it was in furtherance of the conspiracy as a guide to future operations is a permissible inference which the verdict appears to have made. In any event, we do not believe that it was necessary to prove overt acts within the Southern District of New York during the period of limitations. The crime of conspiracy was committed within the Southern District of New York, and petitioners were therefore tried within the district where the crime was committed as required by the Sixth Amendment. Proof of acts in furtherance of the conspiracy within the period of limitations was, of course, necessary to show that the prosecution was not barred by the statute but such proof did not change the char-

acter of the crime nor the place of its commission. Since the conspiracy had not terminated within the period of limitations, petitioners were properly tried in the district where part of the offense was committed. The validity of such a rule is shown by the evidence in this case. One of the important items of proof establishing the continued existence of the conspiracy within the period of limitations was payment by means of the raw film purchasing contract as late as 1941 (*supra*, p. 13). Although the payments were made in California (R. 1477–1480, 1498, 1504–1505), and in part delivered in Chicago (R. 1129) the arrangement for such payments was made in the Southern District of New York (R. 1348, 1351, 1352).[8]

(b) *Unknown parties.*—Petitioners argue (C. Pet. 19, 23, 24, C. Br. 7, 29, 31; K. Pet. 10, 20–22) that there was a fatal variance in the failure to name in the indictment certain persons whose

[8] Petitioner Kaufman erroneously states (K. Pet. 10, 22) that a bill of particulars was denied. The record discloses that on motion by petitioner Compagna and others Judge Hulbert granted two items of particulars not sought in conformity with a previous decision in the Browne and Bioff case [unreported] (R. 40). On a prior indictment the trial court had granted Kaufman the right to particulars as to "what places other than the Southern District of New York the acts charged in the indictment were committed". In this case Kaufman entered into a stipulation whereby he was deemed to have made a similar motion for a bill of particulars, and to have had it decided in the same manner. (R. 13a, 18–18b.) Petitioners failed to submit orders embodying these decisions.

names must have been known to the grand jury. One such person is Zwillman, who was mentioned several times as the New Jersey "contact" of the "outfit" (see *supra,* p. 8). While this evidence may disclose enough to warrant suspicion, it was not in itself sufficient to link Zwillman with the conspiracy here involved, and it may be assumed that the grand jury considered itself unwarranted in so naming him on the evidence before it. As to Rio, the evidence shows that, although he was a leader of the "outfit" in 1934 when the arrangements were made to elect Browne president of the union, he died early in 1935 before the major activities here involved were undertaken (R. 166).

The other alleged variance is the failure of the indictment to name as one of the victims Barger, the operator of the Rialto Theater in Chicago, who was forced into a "partnership" with the "outfit" and who was compelled to employ petitioners Maritote and D'Andrea (see *supra,* pp. 10–11). As authority for holding the variance fatal, petitioners rely upon *United States* v. *Riley,* 74 Fed. 210 (C. C. Ky. 1895), a case not involving a conspiracy. Here the name of the victim was in no way a part of the offense charged; indeed the conspiracy would have been punishable even if it had not been successful. Hence, the variance is not material. Cf. *United States* v. *Heitler,* 274 Fed. 401, 403–405 (N. D. Ill.), affirmed, 289 Fed. 1021 (C. C. A. 7);

Leverkuhn v. *United States*, 297 Fed. 590, 592 (C. C. A. 5), certiorari denied, 266 U. S. 603; *Jones* v. *United States*, 11 F. 2d 98, 100 (C. C. A. 4), certiorari denied, 271 U. S. 682. A variance is not fatal unless it affects "substantial rights." *Berger* v. *United States*, 295 U. S. 78, 82. There could have been no element of surprise here because the evidence affirmatively discloses that petitioners knew that Barger had testified before the grand jury, for D'Andrea questioned him twice and was apprised of the nature of Barger's testimony (R. 2144–21145, 2151–2152).

2. Petitioners argue (C. Pet. 15–16, 21, C. Br. 3–4, 9, 53–61, K. Pet. 12, 16, 32–33) that it was prejudicial error to permit victim witnesses to testify to their reasons for paying money to Bioff. The testimony to which they object falls into two categories—(1) statements by several victims elicited on direct examination that they paid the money because they were afraid the theaters would be closed and they would be financially ruined (R. 960, 1337, 1355, 1550–1551, 1558, 2152),[9] and (2) evidence, usually adduced on redirect examination of the victims, that they feared violence and had experienced violence in former strikes (R. 1467, 1558, 1660, 1799, 1801). The division of

[9] The testimony of Warner on direct examination, that he knew "the record of these people, a murder or two to their credit" (R. 1557; see Br. 55) was stricken out by the court (R. 1558).

opinion in the Circuit Court of Appeals (R. 4196–4198) was apparently only on this latter testimony, i. e., fear of violence. Most of this evidence to which petitioners refer (C. Br. 54, 56)—statements by the witnesses Schenck and Coston (R. 1467, 1799, 1801)—was opened up by defense counsel who, on cross-examination, questioned Schenck at great length about his mental processes before he agreed to pay the money to Bioff (R. 1356, 1387, 1395–1404, 1409–1412), and cross-examined Coston about payments made in 1932 following the strike in 1931 at which violence occurred (R. 1754, 1756, 1757–1759).

Apart from this consideration, we submit that the majority of the court below was correct in holding admissible the testimony of the victims' state of mind at the time of payment. As all three judges below agreed, such evidence would be clearly admissible on a trial for the substantive offense. *Nick* v. *United States,* 122 F. 2d 660, 671 (C. C. A. 8), certiorari denied, 314 U. S. 687; *Greater New York Live Poultry C. of C.* v. *United States,* 47 F. 2d 156, 159 (C. C. A. 2). Since evidence of the commission of the substantive offense is always evidence of a conspiracy, we see no reason why evidence proving the crime should not be admissible in a prosecution for conspiracy. While this Court in *United States* v. *Local 807,* 315 U. S. 521, stated that the motive of the payors is not the controlling factor in determining

whether payments were demanded for a bona fide purpose, it did not hold that proof of such motive is irrelevant in determining whether the payments were in fact extorted.

Moreover, whatever may be the general rule, in this particular case the evidence was directly relevant to the issues before the jury. The theory of the defense, articulated by counsel in their opening argument (R. 84–85, 87–88), was that the moneys given to Bioff were voluntary bribes, not paid under duress. The victims' state of mind in making the payments was thus put in issue by petitioners themselves, and they are in no position to complain because the evidence on that issue proved unfavorable to them.

3. The objections to the prosecutor's closing argument (C. Pet. 20, 22; C. Br. 4, 72, 69–77; M. Pet. 7, 19–21; K. Pet. 17–18, 29–30) assume that the prosecutor painted a lurid and unwarranted picture of petitioners' activities. But the Government was here prosecuting a group characterized by the Circuit Court of Appeals as "a gang of confederates who lived by blackmail" (R. 4192) whose crime "struck at the heart of civilized society" (R. 4198). A fair summation of the evidence could not fail to present petitioners in a less than favorable light. The answer to petitioners' objections to the argument of counsel is that the statements of which they complain are amply supported by the evidence. Thus peti-

tioners state (C. Br. 70) that the prosecutor erroneously referred to evidence of the conversation between Bioff and Korshak which had been stricken from the record, but the fact is that, after the testimony had been stricken on direct examination, the subject was explored by defense counsel on cross-examination (R. 403, 405–409, 414, 724) and was then testified to on redirect and recross-examination (R. 915–921, 932–934). The testimony as to a deposit by union officials to the credit of deLucia's child (see C. Br. 70) was mentioned by the prosecutor for the same purpose for which it was admitted, that is, to show association (R. 314), and far from being used as an appeal to prejudice, was referred to merely as opening an account for a "member of deLucia's family" (R. 3702). It was a fact established by the evidence that Bioff was convicted of pandering while he was working for Rio, Circella and D'Andrea (R. 105, see R. 3638) and Bioff did testify, as the prosecutor stated, that in an application for life insurance he named D'Andrea's brick yard company as his employer (R. 106–107, see R. 3685).

Similarly, Bioff testified that the "outfit" sent men to Chicago to "see to it that those who pledged to go along with us would live up to their promise" (R. 144), that the delegation which appeared included petitioners Maritote [Diamond] and Circella, and that they all made themselves

conspicuous among the delegates (R. 145–146). The prosecutor's summation of this testimony (R. 3639, 3641; see C. Br. 70, 71; M. Pet. 6, 7, 11, 19–20) was therefore fully justified. The summary of Sherman's testimony (R. 3640; Pet. 71) was an accurate account of what occurred when Sherman was on the stand (see R. 3134–3135). There was considerable evidence in the record as to an attempt by the IATSE to gain control of the actors' union (R. 323–326, 1123–1126) and when the prosecutor used the word "kidnapped" in referring to this evidence (R. 3700; see C. Br. 71) the court, after objection by defense counsel stated "the use of the word 'kidnapped' is rather rhetorical. I do not know whether the evidence quite justifies it" (R. 3700). As to petitioner Roselli (R. 3695; see Br. 71) there was proof that he was receiving a mysterious income of $600 a month from Casey (Defendant's Exhibit HHH, R. 4016). The references to the vulnerability of theater owners to vandalism (see C. Br. 69) was based on testimony in the record (see *supra,* p. 24) and was in any event merely a statement of a fact known to everyone, that motion pictures are exhibited in the dark. The prosecutor's reference to possible disclosures which might result from convictions in this case (R. 3710; see C. Br. 71, K. Pet. 30) was corrected by the judge who, on objection by defense counsel, stated "I think we might better

confine our argument to the present and let the future take care of itself" (R. 3710).

Petitioner Kaufman's objection to the prosecutor's reference to the witness Roach (K. Pet. 17, 30) is unjustified since the testimony had not at that time been stricken and Kaufman's counsel had himself referred to it (R. 3605–3606). When the judge stated that he was going to instruct the jury to disregard the testimony the prosecutor made no further reference thereto (R. 3629). The summary of the testimony linking Kaufman with Zwillman (see K. Pet. 17, 18, 29–30), was based upon the record; the propriety of admitting such testimony is discussed *infra*, p. —. The reference to Kaufman's failure to call his associate (see K. Pet. 17), was in reply to suggestions by Kaufman's counsel that the Government failed to offer available proof (R. 3573, 3590). The trial court characterized such arguments, on both sides, as immaterial (R. 3624).[10]

When the closing argument of counsel is read as a whole and in the light of the record, we think there can be no question as to its propriety. The Circuit Court of Appeals in denying an application for bail by petitioners other than Kaufman stated in a memorandum opinion filed June 5, 1944:

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[10] The suggestion (C. Br. 71, 77) that the Government called McLane merely to show that he was afraid to testify is refuted by the prosecutor's account of his reasons for calling McLane (R. 2345–2347).

> So far as we can see, this "appeal involves no substantial question which should be determined by the appellate court." The only question which has the least trace of plausibility is the supposed impropriety of the prosecution's summing up. At the argument we were impressed with this possibility, as to which two members of the court expressed themselves vigorously; but upon examination it appears that the summing up was quite within the permissible limits.

4. The various objections to the judge's charge are without substance.

(a) The argument (C. Pet. 12–15, 20, 25; C. Br. 3, 8, 31–42) that the court erred in failing to submit to the jury the question of whether the activities here involved came within the statutory exemption of acts designed to secure bona fide payment of wages is frivolous. There was never any contention in this case that the payments by the exhibitors and producers here involved were for any bona fide labor union purpose. The whole theory of the prosecution, amply established by the evidence, was that the petitioners other than Kaufman, constituting an organized gang in no way connected with the union, used the union as a means of extorting funds for their personal benefit, and that Kaufman, together with Bioff and Browne, used their union positions knowingly to further such ends. These petitioners did not contend that

the payments were for genuine union purposes; as appears from the opening argument of their counsel, their contention was that the payments were bribes voluntarily given (R. 84–85, 87–88). Petitioners never requested the judge to instruct the jury as to the labor union proviso. Number 16 of their additional requests to charge (R. 3780) to which they now refer (C. Br. 34), is not clear, but at most sought an instruction that petitioners were not guilty if the money was paid to Bioff and Browne to prevent a strike. This instruction was properly refused. The fact that coercion designed to accomplish a genuine union objective has been held exempt under the act certainly does not preclude prosecution of persons who use their union position, not for union purposes, but for their own personal benefit. *Nick* v. *United States,* 122 F. 2d 660, 669–670 (C. C. A. 8), certiorari denied, 314 U. S. 687.

(b) Contrary to petitioners' contention (C. Pet. 16–18, 22, 23, 25–26; C. Br. 4, 8–9, 42–52, 61–62; M. Pet. 6–7, 15–16), the judge properly instructed the jury in respect of interstate commerce. That the exhibition of motion pictures is an industry affecting interstate commerce within the reach of federal power, has been too recently decided to require discussion. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; see also *Nick* v. *United States, supra.* Petitioners constantly refer to Barger's Rialto Theater as a burlesque house but

the evidence is clear that he showed motion pictures and stage shows alternately, and that the motion pictures were products of the large producing companies (R. 2110–2111, 2115). The integrated character of the production, distribution and exhibition fields of the motion picture industry was fully developed by the evidence (R. 1327–1328, 1524–1525, 1547–1548) and petitioners themselves concede that "the producers in Hollywood are so closely connected with the exhibitors that neither the producers nor exhibitors could withstand a strike in the Chicago theaters" (C. Pet 4). The judge gave the instruction requested by petitioners as to interstate commerce (R. 3721; see R. 3766–3767). His subsequent statement that "it does not seem to me that there is any contradiction as to the first one, that is, that whatever was done was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce" (R. 3722) was clearly justified in view of the undisputed evidence as to the character of the motion picture industry.[11]

(c) As to the statute of limitations (C. Pet. 18, C. Br. 4, 10, 64–68; M. Pet. 7–9, 17–18, K. Pet. 20) the judge specifically singled out this subject

[11] The judge's statement (R. 3722) that nothing was said about interstate commerce in the summations was correct. The references to which petitioners now point (C. Br. 45) are merely summaries of the indictment (R. 3378, 3503–3504).

for detailed discussion (R. 3731–3734). Petitioners Compagna, and others have quoted one paragraph out of its context (C. Br. 64) and ignored the preceding page and one-half in which the judge noted the claim of withdrawal by several of the petitioners and carefully instructed the jury in accordance with well established law that, if a person is once shown to have been connected with a conspiracy, he must, in order to escape liability for subsequent acts, prove an affirmative act of withdrawal before the period of limitations. *Hyde* v. *United States,* 225 U. S. 347, 369; *Local 167* v. *United States,* 291 U. S. 293, 298; *United States* v. *Perlstein,* 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *United States* v. *Graham,* 102 F. 2d 436, 444 (C. C. A. 2), certiorari denied, 307 U. S. 643.[12]

(d) Petitioner Kaufman contends (K. Pet. 18–19, 30–31) that the court erred in failing to charge the jury as requested that the defendant's plea of guilty serves as a continuing denial of the evidence offered against him. The language of the requested instruction is from an opinion of the Circuit Court of Appeals for the Third Circuit in

[12] Petitioner Maritote's suggestion (M. Pet. 17–18) that he should be held to have withdrawn from the conspiracy because of the absence of proof of his activities after 1937 finds no support in the cases. As to the sufficiency of the evidence to convict Maritote (M. Pet. 6, 10–14), the evidence is clear that he was more than a passive observer; he actively benefited from the conspiracy through the receipt of more than $13,000 from Barger (see *supra*, p. 11).

United States v. *De Angelo,* 138 F. 2d 468, discussing the effect of an acquittal as *res judicata.* That case does not hold, as petitioner apparently contends, that such an instruction must be given upon request. Here, the trial judge instructed the jury fully on the presumption of innocence, and the necessity of proof beyond a reasonable doubt (R. 3715–3717). He specifically charged the jury that: "A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment and thus places upon the Government the burden of proving such defendant's guilt beyond a reasonable doubt" (R. 3717).

(e) The judge's remarks on the right of review (see C. Pet. 19, C. Br. 4, 11, 68–69) were made casually as an apology for the fact that he was reading his charge (R. 3712) and as emphasizing that the function of defining the law was for the court (R. 3714). They conveyed to a metropolitan jury no knowledge which it did not already have. Furthermore, on exception by counsel for the defense, the judge withdrew the comment and told the jury to disregard it (R. 3740).

5. The record shows that after the jury retired, at 12:50 P. M., the judge stated in the presence of counsel that he had received a request from the jury for certain evidence; that, on his way to the courtroom he had stopped and asked the jury if they wanted the testimony read, and that upon receiving an affirmative reply he had told them

to go to lunch and that in the meantime arrangements would be made to read the testimony to them (R. 3744). No defense counsel voiced any objection to the judge's actions. Petitioners contend (C. Pet. 19–20, 23; C. Br. 4, 12, 78–84) that this communication to the jury requires reversal of the convictions herein.

We think that the Circuit Court of Appeals was clearly correct in holding "There can not be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused" (R. 4196). The cases upon which petitioners rely (Br. 80–84), in which reversals were predicated upon some private communication with the jury in the absence of counsel, all involve situations in which the communication to the jury related to an issue in the case. Here it is clear that there was no communication relating to an issue in the case and therefore no possibility of prejudice. Cf. *United States* v. *Graham,* 102 F. 2d 436, 444 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Outlaw* v. *United States,* 81 F. 2d 805, 808–809 (C. C. A. 5), certiorari denied, 298 U. S. 665.[13]

[13] There is, of course, no warrant for petitioners' implication (C. Br. 79–80) that the judge gave less than a full account of what occurred in the jury room. The same is true of petitioners' reference (C. Br. 79) to other notes sent by the jury (see R. 3745) and their attempt to imply that some impropriety occurred in connection therewith because the record merely contains the statement of the judge following a notation "(After reading note from jury)."

6. Petitioner Kaufman makes several contentions applicable to his conviction alone.

(a) His chief contention (Pet. 11, 12–13, 24–27) is that the evidence does not justify his conviction for conspiracy. He states (Pet. 11) that "the only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged in the indictment was the testimony of the Government's principal witness directly denying petitioner's participation." Such is not the case. The strongest direct evidence against Kaufman was the fact that he received $20,500 from Warner Bros. under circumstances indicating clearly that it was not for a legitimate union purpose and that he himself stated that $15,000 of that money went to Bioff (see *supra,* pp. 16–18). Bioff's testimony about Kaufman's request for help and about his own conversation with Warner Bros.' representative (*supra,* p. 16) is merely corroborative of the inference from Kaufman's own admission that Kaufman was relying upon Bioff's strength to support his demands. In view of this evidence it could reasonably have been inferred that Kaufman knew the source of Bioff's power on which he was relying. Even if Kaufman were unaware of the identity of Bioff's coconspirators, such fact would not absolve him so long as the evidence established that Kaufman was willing to use the power of the conspirators to further his own ends and was, according to his own admis-

sion, willing to aid that conspiracy by turning over to it $15,000. If Bioff was telling the truth when he testified that Kaufman did not in fact turn over the $15,000 (*supra,* p. 18), it was nevertheless true that Kaufman was using the conspirators' powers in aid of his own purposes. Kaufman stresses, as proof of innocence, the fact that the Newark representatives of Warner Bros. testified that he made no threats in the course of negotiations which resulted in the payments (Pet. 12). It is a reasonable inference that, if Warner Bros. felt called upon to pay $20,500 to Kaufman without threats it was because they were already well aware of the power which could be mobilized on his behalf.

(b) The challenged evidence (Pet. 10–11, 23–24) that in 1934 the members of the outfit stated that they would secure Kaufman's vote for Browne (*supra,* p. 8) was clearly admissible against all the other petitioners as statements made in the course of the conspiracy for a definite purpose in furtherance of the conspiracy. Such statements were, of course, not proof that Kaufman was a member of the conspiracy but, when independent proof connected Kaufman with the conspiracy, the acts of his co-conspirators in the course of the conspiracy were admissible against him. *United States* v. *Manton,* 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States,* 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom.*

Gullo v. *United States.* 302 U. S. 764; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States,* 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States,* 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper* v. *United States,* 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702. The declarations here involved were not, like those in the cases upon which petitioner relies (K. Pet. 23–24), merely statements by a co-conspirator designed to show petitioners' membership in the conspiracy but were declarations in furtherance of the conspiracy itself.

(c) There was evidence that, on January 19, 1942, four months after his arrest on a prior indictment against Kaufman and Circella (see R. 13), Kaufman stated at a meeting of his local that "there were some people in the room who would want to have him in jail but that he wouldn't go to jail and that he would be here and alive when the others would be dead and they wouldn't die a natural death" (R. 2296, 2301). As the court below held (R. 4201), this "testimony as to what Kaufman said at a public meeting, held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who had testified against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth." Compare

Banning v. *United States,* 130 F. 2d 330, 338 (C. C. A. 6), certiorari denied, 317 U. S. 695; *Vause* v. *United States,* 53 F. 2d 346–354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Madden* v. *United States,* 20 F. 2d 289, 294 (C. C. A. 9), certiorari denied *sub nom. Parente* v. *United States,* 275 U. S. 554. To hold, as petitioner contends (K. Pet. 13–14, 27–28), that such threats are not admissible unless the threatener directly refers to the charge against him would be merely to encourage carefully veiled but well understood threats of like character.

(d) Contrary to Kaufman's contention (K. Pet. 14–15), evidence that in 1932 Kaufman and his associates opened negotiations with Warner Bros. by placing a gun on the table was clearly admissible to show the plane on which those and subsequent negotiations were conducted. In part this testimony helps to account for Warner Bros.' willingness to pay $20,500 in the years from 1936 to 1940 without direct threats on Kaufman's part.

(f) Kaufman offered to prove that in 1936, while his local was involved in litigation,[14] he appealed to Bioff and Browne for assistance and that such assistance was denied (R. 3079–3081). He now claims that refusal of the court to admit such evidence was reversible error (Pet. 15–16,

[14] The details of that litigation appear in recorded opinion of the New Jersey Chancery Court. *Collins* v. *IATSE Local No. 244,* 119 New Jersey Equity 230 (1935).

29). It is clear, however, that admission of evidence on such a collateral matter could have given rise to many collateral issues. The proposed testimony was not direct proof that Kaufman was not part of the conspiracy with Bioff and Browne; it was direct proof merely that Bioff and Browne did not wish to intervene in that matter. Their reasons for doing so may have been based on many grounds other than the fact that Kaufman was not a co-conspirator. The admissibility of such evidence was a matter peculiarly within the discretion of the trial judge and presents no issue for appellate review.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
BORIS KOSTELANETZ,
RAYMOND P. WHEARTY,
Of Counsel.

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OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

J. Bertram Wegman,
Harold Simandl,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF

This reply to the Government's brief in opposition to the petition for a writ of certiorari is submitted primarily for such assistance as may thereby be afforded to the Court in collating those questions presented by the petition, based upon the record in this case, which apparently (if not adroitly) have not been taken into account in the opposition offered.

Distortion of the issues is not helpful in considering whether this case is worthy of a full hearing on the merits. Too much prejudice has intervened below. This Court is the last resort for the correction of unjust, and for the preservation of proper, legal standards.

Of course, comparing the questions presented on pages 9 through 20 of the petition with the Government's statement of the questions in its brief on pages 2 and 3 will demonstrate at once that instead of any effort to show that the case does not present these questions, many of them simply have been ignored. Nevertheless, these questions persist.

For the convenience of the Court the argument of the Government, and particularly the lack of argument, is now discussed as pertaining to each of the reasons relied upon in the petition for the allowance of the writ, in the order there enumerated.

I

(Petition, pp. 20-22)

The Government's brief (pp. 22-24) avoids meeting the proposition that the indictment invaded petitioner's constitutional right to be truly informed. The Government seeks to treat the matter simply as a variance. While as well a variance, the false allegation that Rio, Zwillman and Buchalter (not to overlook Barger) were unknown to the Grand Jury was more than that, it was a deliberate deception. These individuals were known to the Grand Jurors who presented them as unknown. The question persists whether such an indictment, demonstrated to contain false allegations, violates constitutional provisions for the protection of a defendant.*

While the Government's brief purports to offer some excuse for the failure to name Rio and Zwillman, not even the least excuse is suggested for the failure to name Buchalter, who, if the Government's proof was credible, was as deeply involved, and so shown to be by the most direct evidence, as anyone in the case. Buchalter was still alive at the time of trial.

If the excuse offered for omitting the name of Zwillman (and of course it was no excuse at all for not naming him as a conspirator but not a defendant,—as others were so named) were at all sincere, then what is the excuse for the references in the prosecutor's argument and now in the

* See also, IX, page 8, *infra*.

Government's brief, attempting to link petitioner to Zwillman and through Zwillman to the conspiracy? *

Zwillman and Buchalter were the very persons claimed to be the link—and the only link—between this petitioner and the other alleged conspirators.

II

(Petition, page 22)

Petitioner urged that the practice in the Second Circuit governing bills of particulars in criminal cases is so inconsistent with what this Court has indicated to be proper, that action by this Court is required. In a footnote on page 22 of its brief, the Government asserts that petitioner is in error in stating that a bill of particulars was denied. Reference to the record will show that for all practical purposes, particulars were denied. The single item allowed could serve no practical purpose in the preparation for trial upon the indictment. The single item of particulars allowed did not touch the situation of the "unknown" persons.

III

(Petition, pp. 23-24)

The Government's brief (pp. 37-38) concedes that the hearsay statements "were, of course, not proof that Kaufman was a member of the conspiracy but, when independent proof connected Kaufman with the conspiracy the acts of his co-conspirators in the course of the conspiracy were admissible against him".

---

* For example, the argument on pages 8, 18 and 29 and the footnote on page 18 of the Government's brief. Incidentally, in that footnote the Government failed to point out that all of the matters mentioned therein took place years after the time of the alleged hearsay conversations.

Note also the statement in the prosecutor's summation (R. 3631): "Now the indictment still charges that these defendants conspired with certain persons who were to the Grand Jurors unknown, and I think in the course of the trial your knowledge of those persons has been somewhat extended."

The fault with the Government's argument is that it ignores altogether, as though because of its silence this Court would not notice, the essential nature of petitioner's complaint, that the Trial Court refused to charge the jury that petitioner's connection with the conspiracy could not be found from that hearsay. Instead, the Trial Court charged that the hearsay was "not alone sufficient".

An examination of the cases cited in the Government's brief and examination of the cases cited by petitioner from the Sixth, Eighth and Tenth Circuits as well as from this Court, will show that the case at bar stands alone in giving approval to the use of hearsay declarations together with other evidence for the purpose of showing connection.

The Government's brief fails to recognize, also, that without the aid of the hearsay, all of the testimony concerning payments by Warner Bros. to Kaufman can afford no basis for any inference (a) that Kaufman knew of any conspiracy, and (b) much less, that he was a member of it.

Since the Trial Court refused to instruct the jury that this hearsay could not be considered as proof to connect petitioner with the conspiracy, but on the contrary said only that such hearsay was "not alone sufficient to establish a connection", it cannot be said that the jury did not take the hearsay into account in deciding the issue of connection.

IV

(Petition, pp. 24-27)

The Government's brief (pp. 36-37) assumes quite without foundation that it is petitioner's chief contention that the evidence does not justify his conviction. On the contrary, that is a subsidiary question because of the improper submission of the case to the jury, the improper indictment, the improper conduct of the prosecutor and the other questions of law set forth in the petition.

The Government says that it is not true as stated in the petition that "The only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged in the indictment was the testimony of the Government's principal witness directly denying petitioner's participation."

But in his summation the prosecutor said (R. 3630-3631) "In this case we are fortunate, because some of the conspirators testified before us. In most cases you can only prove a conspiracy by indirect evidence."

Now the Government says that "The strongest direct evidence against Kaufman was the fact that he received $20,500 from Warner Bros. * * *." Surely, the Government's counsel is confused. That was clearly circumstantial evidence, and it cannot be disguised merely by labeling it "direct". It remains circumstantial evidence despite the Government's assertion and, for the reasons pointed out in the petition, certainly equivocal at most.

V

(Petition, pp. 27-28)

The Government's brief (pp. 38-39) makes no effort to distinguish the authorities and the cases cited in the petition, nor to dispute that the ruling here is contrary to the decisions of this Court and in direct conflict with decisions in other Circuit Courts of Appeals.

Instead, three citations are offered to support the admissibility of the evidence. The *Banning* case (130 F. [2d] 330) does not touch this question at all; that case had to do with an effort to fabricate evidence. In the *Vause* case (53 F. [2d] 346) and the *Madden* case (20 F. [2d] 289) the proof was unmistakable that the spoliation there involved had direct relation to the case on trial.

It is precisely this petitioner's contention that evidence of spoliation can be admitted only where the effort has direct connection with the case on trial. It certainly does not impeach petitioner's argument to cite cases which stand for the very rule petitioner urges.

VI

(Petition, p. 29)

The Government's brief (pp. 39-40) on this point seems to ignore the Government's own argument elsewhere that petitioner was using the power of Bioff and Browne in aid of his own purposes. Petitioner's offer was to show that they refused to use their power on the only occasion when he asked them to do so.

Had the evidence not been excluded, the prosecutor might not have been able to argue in summation (R. 3656) that there was some significance in a telephone call from the apartment of Bioff and Browne in New York to the petitioner, which the prosecutor described as occurring "during the height of the extortions in April, 1936", and (R. 3657) "It is a fair inference that under the appropriate circumstances, he [Kaufman] knew he could call on Zwillman, on the Chicago mob or on Bioff or Browne to enforce the collection of the particular tribute".

VII

(Petition, pp. 29-30)

The Government's brief (pp. 26-30) argues that the statements in the prosecutor's summation, of which petitioner complains, were amply supported by the evidence. It is unfortunately true that evidence was improperly admitted which undoubtedly was offered in the first instance only to provide a basis for the prosecutor's appeal to prejudice.

But:

Was it "fair summation" for the prosecutor to state that there was proof of association between Zwillman and the Chicago defendants, upon hearsay testimony which the Government elsewhere argues (Gov't Brief, p. 23) was not sufficient to link Zwillman with the conspiracy?

Was it "fair summation" to urge the jury to draw inferences unfavorable to the petitioner from his failure to produce Buchalter and Zwillman as his witnesses? Even in the Government's brief, Zwillman is described as Kaufman's associate!

Was it "fair summation" for the prosecutor to ask for petitioner's conviction so that he might be induced to become a witness against Zwillman, and to describe the latter as his "higher-up"? This reference was hardly cured by the innocuous statement of the Trial Court quoted in the Government's brief. Even had the jury been instructed to disregard this argument, as petitioner requested (Supplemental Request, R. 3790), it is doubtful whether the damage could have been remedied. But even that request was denied (R. 3737).

Was it "fair summation" for the prosecutor to suggest that the Government witness Roach had perjured himself in collusion with the defendants? * The Government's brief is quite in error in stating (p. 29) that the prosecutor made no further reference to Roach's testimony after the Trial Court said that the jury was going to be instructed to disregard the testimony. Even after the Trial Court's statement, the prosecutor persisted in suggesting (R. 3629) that the jury could draw inferences from Roach's testimony.

Was it "fair summation" for the prosecutor to argue that inferences should be drawn against petitioner because petitioner's counsel had objected to a question directed to the witness Jacocks, in an effort to adduce his testimony concerning a statement made to the witness out of petitioner's presence by a third person who had died prior to the trial; and was it "fair summation" to criticize petitioner's counsel because they did not ask Jacocks what the deceased person had said to him?

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* And this, in spite of the extreme efforts of petitioner's counsel to have Roach kept from the witness stand (R. 2335-2337 and R. 2361-2362).

Was it "fair summation" to argue to the jury that petitioner was "handy with a gun" (R. 3692) particularly in the absence of any evidence that petitioner ever had a gun in his hand? (See Petition, pp. 14-15.)

IX

(Petition, pp. 31-32)

The Government's brief (p. 21) is not correct in stating that there was proof of an overt act in the Southern District of New York within three years prior to the filing of the indictment. The alleged overt act is the conversation between D'Andrea and Barger in the summer of 1942. While the Trial Court at first overruled petitioner's objections to this testimony (R. 2143-2148)—which rulings appear clearly to be erroneous—the Trial Court finally decided that the testimony regarding these conversations would be received only as against D'Andrea (R. 2151). It is to be noted that in the Trial Court's summary in its charge of the alleged overt acts occurring within the period of limitation (R. 3734), no reference is made to this alleged occurrence.

Incidentally, as illuminating the Government's technique here (p. 21) as in the Trial Court, in invoking the name of Capone to create prejudice, the record may be consulted to see whether D'Andrea took "Ralph Capone with him to enforce his demands" (R. 2150).

The Government's argument appears to overlook the essential difference between a conspiracy which is an offense as soon as made, and one which has a *locus poenitentiae* of an overt act.

The Government's brief (pp. 19-20) treats as a variance and ignores the falsity of the allegation that the defendants conspired in the Southern District of New York, which was of a piece with the falsity in the allegations concerning "unknown" persons.

This petitioner certainly was not shown to have had any part either in the formation of the alleged conspiracy or

in any of the overt acts within the Southern District of New York. (Bioff was the actor in the Southern District of New York. He said (R. 944) Kaufman was never his partner.)

The Government's brief (pp. 32-33) argues that it is established law that a defendant must prove an affirmative act of withdrawal before he may have the benefit of the statute of limitations.

This ignores the point sought to be made by petitioner that the charge here put the burden of proof, as distinguished from the burden of adducing evidence, upon the defendants. While it may be that a defendant has the burden of adducing evidence of withdrawal, it is respectfully submitted that the burden of proof in a criminal case can never shift from the Government. The error of the Trial Court's charge in this case was that it imposed upon the defendants the burden of proof.

So far as the burden of adducing evidence is concerned, the Government's own proof showed that at a time more than three years prior to the filing of this indictment, Kaufman had affirmatively stated that he was acting for himself alone. There was no proof that thereafter he had done anything at all even remotely connected with any conspiracy. Thus there was on his part affirmative disavowal of any part in any putative conspiracy. The least that was required under the rule of the *Hyde* case (225 U. S. 347) and the *Local 167* case (291 U. S. 293) was that the jury be advised that this proof could be considered. But the request for an adequate charge (#10, R. 3788) was denied. Instead of informing the jury, as requested, that the testimony might be considered upon the question whether Kaufman had disassociated himself from any conspiracy, the jury was told that his very conduct at the time of the disavowal could be considered as proof of guilt. If that is the correct rule, then the statute of limitations is a dead letter in any conspiracy case so far as any withdrawing defendant is concerned.

X

(Petition, pp. 32-33; see also question (j) p. 16)

The Government's brief (pp. 24-26) fails to consider the essential point that the testimony elicited of the "victims'" state of mind was purely subjective,—not evinced in any manner at the time in question.

If the use of such testimony is not condemned by this Court, a defendant will always be at the mercy of an afterthought, and the jury may be swayed by the hindsight of a witness.*

The Government's brief ignores completely the very serious question whether this statute can be construed to include the bare threat of a strike, without any threat of force or violence, as being within the meaning of "coercion".

Miscellaneous Matters

No. 6 of the questions presented (p. 19) in the petition concerned the matter of severance. The Government's brief in opposition is the latest demonstration of the unfairness to the petitioner, throughout this case, in putting him to trial with all of the other defendants and so burdening him with all of the extraneous proof not competent against him alone. Most of the questions presented would never have been in the case had Kaufman been granted the separate trial which simple justice demanded that he have. The Government's brief has ignored the matter of severance. Perhaps this was because there is no answer to it.

No mention is made in this reply brief of the several lapses in the Government's statement of the facts. They do not affect the primary questions presented. The most noteworthy fact about the Government's brief is its avoidance of any discussion of the very matters which justify consideration of petitioner's case by this Court. But petitioner's contentions are not upon the plane of mere trial errors.

*Such testimony does not admit of the possibility of negation. There is no way to test its truth.

Conclusion.

Petitioner contends that the record presents questions involving constitutional rights, the proper interpretation and application of an important Federal statute, and important questions of evidence and of substantive criminal law upon which there is a demonstrated conflict between the Second Circuit and other Circuits, and a disregard by the Second Circuit of applicable decisions of this Court. The failure of the Government's brief to meet these issues is perhaps persuasive that they merit the consideration of this Court. Petitioner's plea is for an opportunity for a full hearing by this Court, in order that he may have an unprejudiced appraisal of the record.

Respectfully submitted,

J. Bertram Wegman,
Harold Simandl,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN RUSSELLA,

Petitioners,

vs.

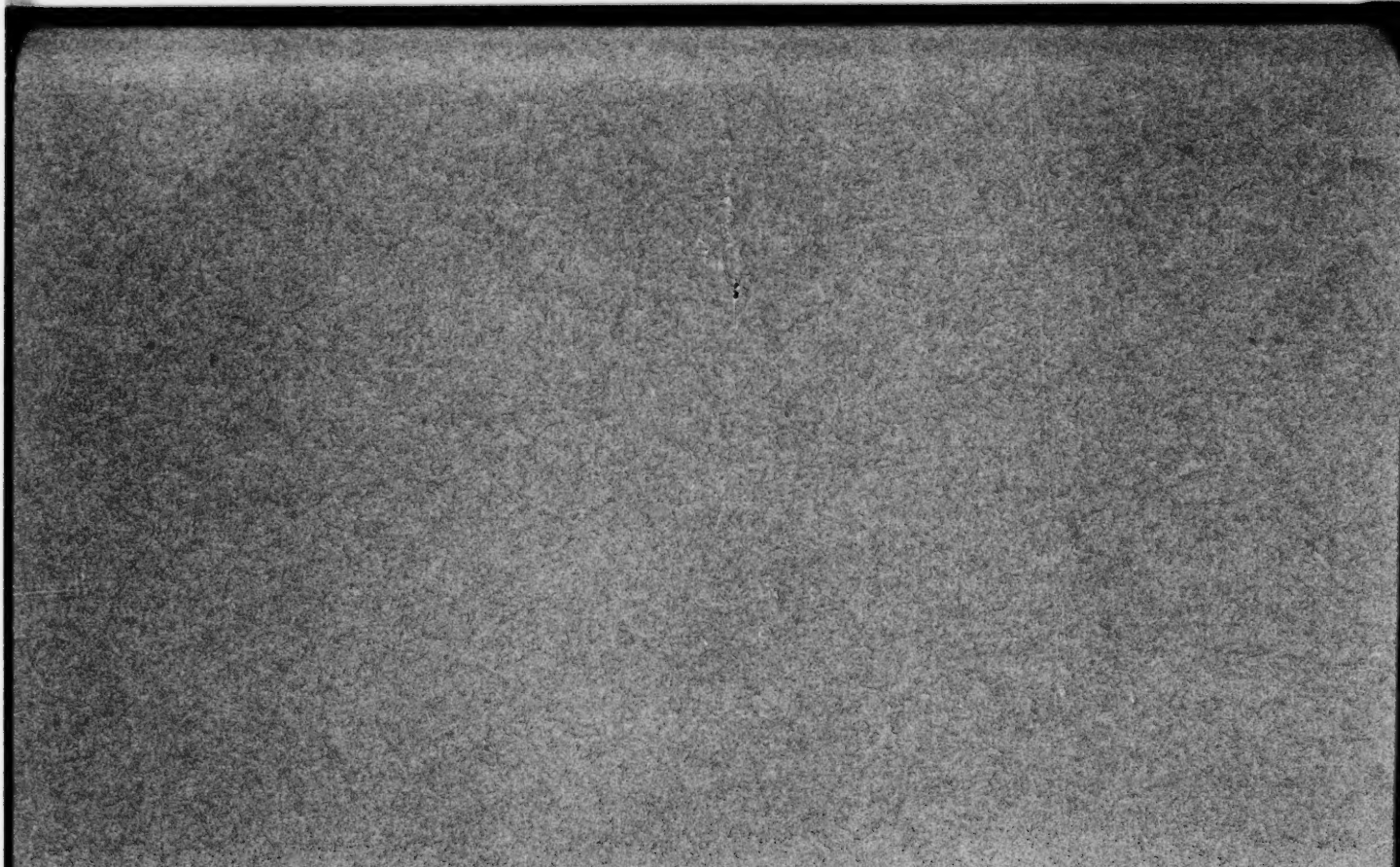
UNITED STATES,

Respondent.

PETITION FOR REHEARING

ON DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WM. SCOTT STEWART,
Counsel for Petitioners.



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Our petition for certiorari was denied April 2, 1945. The Court announced no grounds and cited no authorities. It would be next to impossible for us to guess the reason which impelled each justice to vote against our petition, in order that an effort be made, from the record, to change his mind. We know of no criminal case in which certiorari has been granted after it was once refused, so we are fully aware of the desperate nature of our present

situation. As in a sinking ship, we have thrown overboard all but the following vital defects in the record. We ask your Honors, upon reconsideration, to grant certiorari limited to this vital matter, and request that we be given a place on the summary docket, or that the merits be summarily decided upon briefs. Your petitioners are in the penitentiary where they have been since the entry of the judgment, serving ten year sentences. We have nothing to gain by mere delay. We shall present our point again from a different approach in the hope that we make it clear. We hope to strengthen it and by abandoning everything else, we seek to avoid confusion.

Our last stand is upon the first "Question Presented"[1] (our Petition p. 12).

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[1]We copy from our Petition herein (p. 12):

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QUESTIONS PRESENTED

VENUE

1. In a criminal prosecution where it appears that the defendants have been removed from the district of their home for trial and the only allegation as to venue is a charge that the conspiracy was formed in the district of trial, can the conviction be sustained where the undisputed evidence shows the formation of the conspiracy in the district from where the defendants were removed.

Is the answer to this question affected by evidence showing that some of the conspirators performed acts within the district of trial in furtherance of the conspiracy if it be kept in mind that there are no overt acts alleged, and that the performance of such acts are not referred to in the pleading?

This can be put more forcibly by our present claim that in the light of the constitution and fundamental rules of pleading this indictment and record fails to support the judgment. The error is such that it should be noticed under the principle that in the federal courts relief is granted from plain error and that fundamental constitutional rights are never waived. The rights we seek are committed by law to the protection of this court.[2]

In the new Rules for Criminal Procedure, (not yet in effect) it is provided[3] that the trial judge might transfer

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The Solicitor General restated our question as follows (p. 2):

> "1. Where there was a fatal variance between the indictment and the proof with respect to venue and knowledge by the grand jury of persons referred to in the indictment as unknown."

The government mixed our vital point with another point relatively unimportant. We did not unscramble our points in reply because we assumed that your Honors have often seen that method employed. It is possible, of course, that such method contributed to the failure on the part of your Honors to perceive the importance of our real point.

[2] Our points were urged without success upon the courts below and all necessary steps have been taken to secure review. We mention plain error to show the seriousness of the matter and also because of the defense made here by the government.

[3] Rule 21 (b) OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

proceedings in the interest of justice. If the method adopted by the prosecution in the case at bar has the sanction of this court, the new rule can be circumvented by a false allegation of venue.

We assume, of course, that the new rules reflect a desire upon the part of this court to correct known abuses and to grant relief from plain error. The abuse of defendants by transporting them to distant parts of the United States for trial must surely be known to your Honors from the records of this court.

Constitution.

We rely upon Article III, Sec. 2, Clause 3[4] and the VI Amendment[5].

Your Honors recognized in *United States* v. *Johnson*, 323 U. S. 273, that questions of venue in criminal cases

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[4] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed.

[5] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

are not merely matters of form.[6] The commission of an overt act in furtherance of conspiracy and its allegation are necessary to give local venue (*United States* v. *New York Great Atlantic and Pacific Tea Co.*, 137 F. (2d) 459). This proposition seems to be taken for granted by your Honors in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, as a premise to the question in that case as to the sufficiency of the venue allegations. In the case at bar, no overt acts were alleged. Since our petition was filed there has been published the opinion in *American Tobacco Co.* v. *United States*, 147 F. (2d) 93, 162. In the *American Tobacco case* it was held that there was no error as to the instructions, but the fundamental principles invoked by us here are again recognized.

Also, since our petition was filed, we have learned that your Honors have affirmed *Frankfort Distilleries* v. *United States*, Vol. 89 Law Ed. p. 649, Reported below 144 F. (2d) 824 (C.C.A. 10). The record submitted to your Honors in the *Frankfort case* includes *United States*

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[6] Mr. Justice Reed in dissenting (323 U.S. 280) gave reasons which might require a trial in the district where the dentures were received. We assume that this was done in an effort to ascertain the meaning of Congress. No construction of any such statute is involved in our case. All of your Honors must agree including Mr. Justice Reed, that if Johnson were to be prosecuted in Delaware, the indictment would be required to show facts from which venue could be established.

No good reason can be found in the record for the transportation of these defendants in the case at bar, and the reasons are of no importance one way or another under the circumstances. The reasons underlying the constitution are not now open to debate.

Your Honors might very well divide upon the power of Congress to provide for venue in such as the *Johnson case*, but there can be no dispute on fundamental requirements of an indictment. Such rights are also protected by the constitution. Our point as to the deficiency of our indictment was not involved in the *Johnson case*.

v. *Safeway Stores,* 51 Fed. Supp. 448.[7] Many of the questions in the case at bar are fully discussed in the briefs filed in the *Frankfort case.*[8]

We have copied the indictment as an appendix here in a separate volume (p. 7) submitted with our petition and marked "APPENDICES". We request your Honors to again examine the indictment in the light of our claim that it will not support the judgment.

As appears from the record (R. 28), your petitioners, in a motion for a bill of particulars, requested the following information which was refused (R. 40):

> 1. State the time when and place where the defendants or any of them first conspired to commit the crime charged in the indictment.
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> * * *
>
> 3. State whether there was any subsequent agreement or agreements among the defendants or any of them to commit the crime charged in the indictment, and if so, state the time or times when, and the place or places where such agreement or agreements were made, and the names of the individuals who entered into said agreement or agreements.

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[7] We cited the *Safeway Stores* case in our brief here (pp. 6, 19, 27) and now recommend it as the best explanation of the law to be found upon the proposition that the indictment must contain specific overt acts sufficient for venue purposes. It does not seem right that the only full discussion of our point is to be found in a trial court opinion. We here present an opportunity for this court to speak with authority upon a subject of great importance and of public interest.

[8] The venue question was decided against the defendants in the Circuit Court of Appeals in the *Frankfort case.* It finally resolved itself into a construction of the indictment. The government did not have the temerity to submit the case to the jury upon an indictment such as ours. The decision of this court in the *Frankfort case* did not involve the venue question which appears to have been abandoned by the defendants in that case.

4. State whether any overt act or acts were committed in pursuance of the conspiracy.

5. If the answer to item "4" is in the affirmative, set forth:

(a) The act or acts committed in pursuance of the conspiracy;

* * *

(c) The place where said act or acts were committed;

(d) The time when said act or acts were committed.

Of course, a bill of particulars could not have cured this defective indictment. The refusal supports our claim that the government purposely deceived the defense, and that the lower courts refused relief when fundamental rights were requested.

Since our Petition was filed in this court, the case of *Winebrenner* v. *United States*, 147 F. (2d) 322 (C.C.A. 8) was decided. Although reversed upon other grounds, it held that under the conspiracy statute, venue may be laid at any place where any act has been done by any one of the conspirators in furtherance of conspiracy, and that evidence of overt acts done in Western District of Missouri in furtherance of conspiracy to defraud the United States was sufficient to establish venue in that district of prosecution for such offense, though conspiracy was not formed there. We conclude that some of the acts relied upon to establish venue were alleged in the indictment. There is no discussion of our point. All courts in all cases but ours seem to assume that the point is too obvious for discussion. Permit us to review the cases cited in the *Winebrenner case*.

In *Galatas* v. *United States*, 80 F. (2d) 15, 24 (C.C.A.

8) overt acts within the district of trial are pointed out. In *Sloan* v. *United States*, 31 F. (2d) 902 (C.C.A. 8) cited in the *Galatas case*, the overt acts were alleged. We quote from the *Sloan case* (904):

> "To constitute the crime of conspiracy under federal statutes, two things are necessary: An agreement, and an overt act in pursuance thereof. Except as a matter of venue, it makes no difference where either the agreement or the overt act takes place in order to constitute the crime. The only reason for stating such in an indictment is to fix the venue. Here, both the conspiracy and the overt acts were stated as occurring in the Western District. Proof that either occurred there would sustain such venue. If an overt act were proven within that district, the allegation as to place of agreement (conspiracy) would lose all importance so far as being an essential element requiring proof."

It would seem to follow that if no overt acts are alleged and the only venue allegation was that the conspiracy was formed in the district of trial, that that allegation would have to be proved as laid.

In *Hartzell* v. *United States*, 72 F. (2d) 569, 576 (C.C.A. 8), the sufficiency of the indictment was challenged in a mail fraud case. It will be noticed that sufficient facts were alleged as to the receipt of the letter in the district of trial to establish venue. In other words, the venue allegations were to be found in the indictment.

The opinion in *United States* v. *Downing*, 51 F. (2d) 1030 (C.C.A. 2) was written by Judge Learned Hand who wrote our opinion, and it is important to notice that the Second Circuit carries the rule to an extreme not sanctioned by any other court. We quote (1031):

> "Since jurisdiction depends upon where the crime is committed, and it is committed wherever any part of the agreement is performed, the act of performance

relied upon need not be an overt act laid in the indictment."

Judge Hand cited *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392, and *Ford* v. *United States*, 273 U. S. 593, and carried them a step further which we submit is not the law. Such rule was, no doubt, applied by the Second Circuit in our case, and it conflicts with decisions in other circuits. (*United States* v. *Hosier*, 50 F. (2d) 971, (D. C. 5).)

In *Ford* v. *United States*, 273 U. S. 593, is said in the *Winebrenner case* to be on all fours with it is different from ours in that overt acts were alleged and proved. The rule we contend for was assumed to be fundamental without discussion in the *Ford case*.

United States v. Kissel.

The *Kissel case* is the leading case as authority for the proposition that a conspiracy may be continuous.[9]

Since the day your Honors denied our petition, we have examined the records of this court in the *Kissel case* (218 U. S. 601, No. 390, Oct. 1910). Your Honors will notice that Mr. Justice Holmes was very careful to limit the opinion of this court to mean no more than the possibility of the existence of a continuous conspiracy.[10] We concede that such a conspiracy may exist, the fact remains

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[9] There is a powerful argument to the contrary but we accept the rule as settled by the *Kissel case*. The *Kissel case* does not mean that every conspiracy is a continuous one, or that it must be so whenever the government so designates it.

[10] The indictment in the *Kissel case* alleges facts as to the formation of the conspiracy in the district of trial and contains numerous overt acts specified in the trial district.

that such a conspiracy must be properly pleaded.[11] Judge Holmes said (606) after noting the limitation on this court when an indictment is quashed:

> "This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged."

It can be seen from the facts stated in the *Kissel* indictment that the conspiracy there alleged in the indictment may very well have been a continuing one.

There are no facts stated in the case at bar. The pleader rested upon a mere conclusion that the conspiracy continued. Our right to review is much broader than that afforded the government in the *Kissel case.*[12] We have the absolute right under the rules of pleading to ask your Honors to disregard the conclusion and view the indictment as if the words "continuously thereafter" were eliminated. But we do not need to stand upon any such rule, we can give the government more than it is entitled to and still point out the fatal defect. We assume for the purpose of this argument that the conspiracy

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[11] The instructions are copied (p. 37) from the record in the case at bar in the volume marked "Appendices" furnished with our Petition for Certiorari. Commencing at p. 61 of the Appendices your Honors will perceive that we have emphasized the errors of the court in the matter of taking these vital questions from the jury. The court assumed that the conspiracy was in fact continuous and did not require proper pleading of overt acts or the allegation of any facts as a basis for the claim that the conspiracy was continuous, or that the New York court in fact had jurisdiction.

[12] In our case the demurrer filed by the government (R. 27) to the Plea in Bar (R. 22) claiming the benefit of the Statute of Limitations raised the question of the sufficiency of the indictment. This question was raised by demurrer and motion to quash (R. 19) and in every other conceivable manner in our case.

was continuous, yet, because of venue and the limitations statute, overt acts were necessary and should have been pleaded.

The indictment alleges that the conspiracy was formed "on or about the 18th day of June 1934." This shows upon its face that the Statute of Limitations had run.[13]

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[13] This challenge was made by way of special plea, (R. 20) demurrer and motion to quash, (R. 19) motion for directed verdict, (See Index to Record Volume I) arose on the instructions (See Appendix) and was assigned as error (R. Vol. V., pp. 4056, 4082, 4083, 4095, 4098, 4099). The Circuit Court of Appeals regarded the point as trivial (Appendices pp. 96, 97).

On or about June 18, 1934 could mean June 17, 1934, on which date the Anti-Racketeering Act was not in effect, and there could have been no such conspiracy.

We quote from the dissent in *United States* v. *Perlstein*, 126 F. (2d) 789, 804 (C.C.A. 3). We quote from the dissent because that is the only place our point is discussed in a manner applicable to our case. The majority opinion recognizes the principle but distinguishes the *Perlstein case* in a way peculiar to the charge there made (obstructing justice):

> "Nor does the conspiracy become criminal, after a proceeding is instituted, on the ground that it is a continuing thing. Most conspiracies are continuous in the sense that they ordinarily endure for a period of time for the achievement of their intended end. But, where a conspiracy has been held to be continuous, it will be found to have been a conspiracy for the commission of an offense committable from the outset and, so, capable of continuing for successive achievements of the same purpose, such as combinations in restraint of trade. See *United States* v. *Kissel*, 218 U.S. 601, 607. It is also believed that no case can be found where the alleged conspiracy entered into when its offensive object was legally uncommittable has been held to continue until the offense could be committed and thereupon rendered criminal thereby. * * *
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> "The motion to quash was none the less sufficiently timely. The question of the insufficiency of the indictment in the particular now under consideration was raised in the court below, was fully argued by counsel and was considered and passed upon by the learned trial judge on its merits. The question could even have been raised in this court for the first time. *Rosen* v. *United States*, 161 U. S. 29, 33; *Sonnenberg* v. *United States*, 9 Cir. 264 F. 327, 328. See Zoline, Federal Criminal Law and Procedure (1921), Sec. 216. Moreover, the motion in arrest of judgment after verdict at the second trial brought the question squarely upon the record."

In the case at bar, if the indictment had mentioned no time as to the formation of the conspiracy, it would have been good if it had alleged time in overt acts (*Heskett* v. *United States,* 58 F. (2d) 897). When the time of the formation of the conspiracy is left to conjecture some facts must be made to appear somewhere as against the objection that the statute of limitations has run. If overt acts had been alleged, the government would have been required to prove at least one of them (*United States* v. *Hosier,* 50 F. (2d) 971).

We submit that, for the purpose of this discussion, there are three parts of an indictment which might disclose a continuous conspiracy, *i. e.*:

(a) the object,

(b) the means,

(c) the overt acts.

(a) *The object* of the conspiracy is pleaded in the language of the statute.[14] Roughly speaking, the object was

[14] Please see our brief (p. 21) where we copied from the indictment, *i. e.*:

> "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of money, to-wit, upwards of $1,000,000, and other valuable sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations,"

including (naming companies, plus unknowns)

> "all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear."

to obtain a sum of money. This object can be compared with murder, bribery, burglary, or any specific crime to be accomplished by some act.[15] When the person is killed to effectuate the object of a conspiracy to murder that is the end of the business. In the absence of some special facts, there is no reason to suppose that persons are going to continue to conspire to kill some one over the years without intending to commit the murder. It is more reasonable to assume that they agreed at the outset to get it over with.

In the case at bar the object, as we have said, was to obtain a sum of money. If the money were obtained in 1934, it is repugnant to suppose that the conspirators continued to conspire to get what they already had.

(b) *The means.* The indictment in the case at bar furnishes no means. It alleges that as a part of said conspiracy the defendants would do certain things (Appendix p. 9). There is nothing about these allegations from which it might be concluded that it was intended that the conspiracy continue over a period of years or longer than necessary to obtain the sum of money.

(c) *The overt acts.* No overt acts are alleged.

Suppose for the purpose of argument that on June 18, 1934 your petitioners drew up a written agreement providing that over a period of twenty years they would work together to obtain a continuous supply of money.[16] That would be a conspiracy intended by its terms to continue. But suppose that no one did anything about

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[15] The Anti-Racketeering Act requires *acts*. It does not cover the same field as the Sherman Act. We are not dealing with restraint of trade which requires a continuous course of conduct.

[16] The indictment in the case at bar does not allege any continuous supply of money. Such a case as we use for argument can not be read into our indictment at all.

it, that they just did nothing. The Statute of Limitations would run from the time of the agreement, and that would be the end of the matter. Of course, the conspiracy here supposed could have been prosecuted at any time within three years of its formation, at the place of its formation, without any overt acts.

To suppose another case, if the agreement was made and an overt act committed in 1934, the Statute of Limitations would run from the act. If more than one overt act were committed the statute would run from the last overt act.[17]

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[17] The various Circuits are in conflict upon this subject, but we need not notice the conflicts. We grant the government the most favorable decisions and say that the statute would run from the last overt act.

We quote from *Breese* v. *United States*, 203 Fed. 824, 829 (C.C.A. 4):

> "The next assignment to be discussed relates to a claim of limitation. It is contended on behalf of the defendants that the evidence showed that the offense charged in the indictment was committed more than three years before the finding of the indictment (October 5, 1897), and that the prosecution was therefore barred by the three year statute of limitations. R. S. Sec. 1044, 2 Fed. Stats. Ann. 358 (U. S. Comp. St. 1901, p. 725). The argument is that the conspiracy, if any, was formed more than three years prior to the indictment, and that acts in pursuance of and to effect the object of the conspiracy (R. S. Sec. 5440, 2 Fed. Stats. Ann. 247) were committed more than three years prior to the indictment. But it was also in evidence that acts to effect the object of and in pursuance of the conspiracy were committed within less than three years from the finding of the indictment. It must, we think, be admitted that where a conspiracy is formed more than three years prior to indictment, but where the first overt act is committed within the three years, the prosecution is not barred; and this simply because the offense has not been committed until the doing of the overt act. To say, in this connection, that the making of the corrupt agreement is the crime, is a perversion of the meaning of the Supreme Court in *U. S.* v. *Britton*, 108 U. S. 199. See *Hyde* v. *United States*, 225 U. S. 347, 359. Where, however, the con-

The government, in our supposed case, would be in no different position than if the defendants committed a burglary on June 18, 1934 (or on the day of the last overt act), and the government waited until 1940 to prosecute. A questioned indictment returned more than three years

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spiracy was formed more than three years prior to the indictment, and acts in pursuance thereof are done both prior to and within the three years, there has arisen a difference of opinion. *U. S.* v. *Owen* (D. C.), 32 Fed. 534; *U. S.* v. *McCord* (D. C.), 72 Fed. 159; *Ex parte Black* (D. C.), 147 Fed. 832, 841, and *U. S.* v. *Biggs* (D. C.), 157 Fed. 264, 273, support the theory that in such case the limitation bars the prosecution. The weight of authority, in our opinion, is to the contrary. See *Wilson* v. *U. S.*, 190 Fed. 427, 435, 111 C.C.A. 231; *Hedderly* v. *U. S.*, 193 Fed. 561, 569, 114 C.C.A. 227; *Jones* v. *U. S.*, 162 Fed. 417, 426, 89 C.C.A. 303; *Lonabaugh* v. *U. S.*, 179 Fed. 476, 478, 103 C.C.A. 56; *U. S.* v. *Bradford* (C.C.), 148 Fed. 413, 419; *U. S.* v. *Brace* (D. C.), 149 Fed. 874, 877; *Ware* v. *U. S.*, 154 Fed. 577, 579, 84 C.C.A. 503, 12 L.R.A. (N.S.) 1053, 12 Ann. Cas. 233; *U. S.* v. *Greene* (D. C.), 115 Fed. 347; *U. S.* v *Greene* (D. C.), 146 Fed. 803, 889; *Lorenz* v. *U. S.*, 24 App. D. C. 337, 387; *Com.* v. *Wishart*, 8 Leg. Gaz. (Pa.) 137; *People* v. *Willis*, 52 N. Y. Supp. 808; *People* v. *Arnold*, 46 Mich. 268, 9 N. W. 406; *Amer. Ins. Co.* v. *State*, 75 Miss. 24, 35, 22 South. 99, 102; *Ochs* v. *People*, 25 Ill. App. 379, 414; 6 Am. & Eng. Ency. (2d Ed.) 844; 1 Bishop's New Cr. Proc., Sec. 61; 2 Bishop's New Cr. Proc., Sec. 206; 29 Am. & Eng. Ency. (2d Ed.) 165. That a conspiracy may be a continuing offense, and that prosecution for a conspiracy formed more than three years prior to the indictment is not barred, if it be alleged and proved that the conspiracy continued in force and operation within the period of limitation, is settled by *U. S.* v. *Kissel*, 218 U.S. 601, reversing *U. S.* v. *Kissel* (C.C.), 173 Fed. 823.

"The doing of an act by one conspirator, with the knowledge and consent of the others, in pursuance of an agreement made long previously, and to carry out the purpose of such agreement, necessarily implies at least a tacit renewal of the conspiracy. A conspiracy such as is charged here continues until its purpose has been fully effected or until it has been abandoned. The offense consists, not in the mere agreement, but in the existence of the conspiracy, and the doing of an act to effect the object of the conspiracy. The making of the unlawful agreement and the doing of the overt act more

after the offense with the naked allegation of a burglary in 1934 would not support a judgment.[18]

In the case at bar, we need not concern ourselves with the exceptions to the Statute of Limitations as in those cases where a defendant becomes a fugitive. The government made no such claim. It demurred to the plea of the statute of limitations and resisted the motion to quash solely upon the four corners of the indictment. The point was before the trial court after the evidence demonstrated that the Statute of Limitations had run and after the trial court could see that the indictment failed to support the judgment. The government was compelled to rely

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than three years prior to indictment undoubtedly completes *an offense*, but not necessarily the offense charged in the indictment. The offense charged is a conspiracy, formed by tacitly or expressly agreeing to continue in force a conspiracy originally entered into more than three years prior to the indictment, and the commission of overt acts within the three years. The indictment in the case at bar charged that the conspiracy was formed July 1, 1897, and that the overt act was committed on that date. As time is not of the essence of such a charge, it was permissible to allege one time and prove another. Evidence of a conspiracy formed more than three years prior to the indictment, and of acts done within three years by the different defendants, with the knowledge and consent of the others, in pursuance of and to carry out the purpose of the original conspiracy, clearly support such an indictment notwithstanding evidence of similar overt acts committed more than three years prior to the finding of the indictment. See *Hyde* v. *U. S.*, 225 U. S. 347, 369, *Heike* v. *U. S.*, 227 U. S. 131. The instructions asked by the defendant on this point are all based on an erroneous theory, and it was not error to refuse to give them. The charge given by the learned trial judge in respect to this feature of the case is not open to any exception taken to it."

[18] It seems as if in the federal courts the allegation of a date barred by the Statute of Limitations is sufficient to support the judgment if the defect is not objected to and a proper record made. There was no waiver in the case at bar, and there is no legal method by which our point can be evaded.

upon two words alone, "continuously thereafter." That is our position here.[19]

Nash v. United States.

Nash v. *United States* (229 U.S. 373, No. 197, Oct. 1912) was reversed on other grounds, but it appears to be the leading case for the proposition that no overt act need be pleaded in Sherman Act cases. The *Nash case* holds that the conspiracy made unlawful by the Sherman Act is the conspiracy at common law.[20]

The indictment in the *Nash case* was returned April 8, 1908, charging that the conspiracy was formed in the district of trial on May 1, 1907, so our point was not involved.[21]

Our point can not be evaded because of any technicality as to the manner in which it was raised. Judge Hulbert filed a written opinion (R. 37) in which he disposed of all the preliminary motions together. Our point was regarded as having been properly raised.[22] It will be

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[19] This point is assigned as error in our brief (p. 3, Point 4) and argued under Point One (p. 14). It is possible that it was overlooked because of having been woven into related objections to the indictment.

[20] At common law there was no such thing as a Statute of Limitations (*Dover* v. *Maester*, 5 Esp. 92; *Hyde* v. *Partridge*, 3 Salk, 227, 228). The *Nash case* did not involve the statute of limitations or venue.

[21] It will be noticed that in the *Nash case* the facts are set out in the indictment, means alleged to have been employed are described and a bill of particulars was awarded. Our record is barren of such matters.

[22] We quote from the opinion by Judge Hulbert (R. 39):

> "Defendants' counsel asserts that the cases (*U. S.* v. *Kissel*, 218 U.S. 601; *U. S.* v. *Barber*, 219 U.S. 73; *U. S.* v. *Oppenheimer*, 242 U.S. 85; *U. S.* v. *Ames*, 39 Fed. Supp., 885) cited and chiefly relied upon in support of the Govern-

seen that Judge Hulbert believed that the *Nash case* relieved the prosecutor from the allegation of overt acts, even where Judge Hulbert knew that the defendants were making a point of the Statute of Limitations. Judge Hulbert failed to perceive the point and therefore was unable to distinguish the *Nash case*. The point has been misconceived or disregarded ever since although repeatedly urged.

The Solicitor General in the case at bar concedes (Government Brief p. 21) that proof of acts in furtherance of the conspiracy within the period of limitations was necessary, but the Solicitor General ignores our claim that some of such acts should have been pleaded. It is possible, too, that your Honors overlooked this vital point.

A case in point arose in the New York State courts, *People* v. *Hines*, 284 N. Y. 93. The conspiracy count in the indictment was held to be fatally defective for failure to allege overt acts committed within the Statute of Limitations, although the indictment filed May 26, 1938 charged that the conspiracy continued from March 1931 through January 13, 1937.[23]

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ment's demurrer to the plea in bar, relate to prosecutions in which overt acts were alleged. He states in his brief:

"'It might be added that as far as my research reveals, there is not a single authority which ever passed on an indictment which merely alleged the bare conclusion of the continuance of the conspiracy without overt acts to support it and held that such an indictment was sufficient to preclude a plea in bar based on the statute of limitations.'

"* * * But it is to be observed that at common law it was not necessary to allege or prove the performance of any acts in furtherance of conspiracy, and the practice has only come into use through statutory enactment in specific instances. The Sherman Act punishes the conspiracies at which it is aimed on the common law footing, and decisions as to relations of a subsequent overt act have no bearing upon a statute that does not contain the requirement that an overt act or acts be completed. *Nash* v. *United States*, 229 U.S., 373."

[23] The statutory period of limitations was two years.

Overt acts were alleged to have been committed prior to the statutory period. Under the New York law, overt acts are necessary to make conspiracy a crime. The necessity of overt acts for such purpose is not to be confused with their necessity to establish venue and to avoid the Statute of Limitations. Our point is that when the proof of overt acts are necessary for any such vital purpose they must be in the indictment.

Another Circuit Court of Appeals case has been decided since our petition for certiorari in this court, *Pinkerton* v. *United States*, 145 F. (2d) 252, (C.C.A. 5) holding that an overt act within the statutory must be alleged and proved.

For the purpose of this petition for certiorari, we assume, as a premise, that there could be such a thing as a continuing conspiracy and that under the Anti-Racketeering Act a good indictment could be drawn in some cases without an allegation of overt acts or a description of the means to be employed, for instance, where the conspiracy was formed in the district of trial and the indictment returned within three years. Our point is that such allegations were vitally necessary in the case at bar in order to fix venue and to avoid the Statute of Limitations as against the attack made.

Venue.

As we said in our Summary of Point One (our Brief p. 14):

> "Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district."

During the trial, as is shown by the record, the government made no pretense at claiming that the conspiracy was formed in New York. In this court the Solicitor General practically admits the falsity of the allegation (p. 18) and requests your Honors to adopt the legal fiction that the conspiracy was renewed in New York.[24]

It has been held that failure to properly allege venue is inexcusable in view of constitutional right to trial in district wherein the crime was committed. (*Bratton* v. *United States*, 73 F. (2d) 795, 798 (C.C.A. 10). See *Grigg* v. *Bolton*, 53 Fed. (2d) 158, (C.C.A. 9), *United States* v. *Linton*, 223 Fed. 677.) No authorities should be required to support our claim that the method adopted by prosecution in the case at bar was inexcusable. It was dishonest and purposely deceptive.

In answer to our assertion that the allegation that this conspiracy was formed in the district of the trial was false (our petition, p. 12, our brief p. 14), the government referred your Honors to the Anti-Racketeering Act (Appendices pp. 3-4) which provides [420 (d)] that prosecution may be had where any part of the offense was committed. The record does not show any reliance upon this section below and we gave the government brief no heed on this in our reply. It is possible that your Honors were deceived, but hardly probable. Section 420 d is a useless piece of legislation. The law remains as it had been established, and your Honors must know that Congress has

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[24] We demonstrated the inapplicability of the cases cited here by the government in our reply brief (pp. 1, 2).

The evidence pointed to in this court by the Solicitor General and designated as overt acts within the district of trial and within the three year term is open to dispute also, but such contest is beside our main point, *i. e.*, that no allegation of them was attempted.

no power to extend jurisdiction (*Weinberg* v. *United States*, 126 Fed. (2d) 1004).[25]

Prejudice Created.

The government claimed here that no prejudice resulted from the errors committed, and the Circuit Court of Appeals said that the variance was trivial. If your Honors were influenced by such argument, your Honors have misconceived the rule against variance between pleading and proof. That rule depends upon the fundamental principle that an accused is entitled to be advised in advance of the charge he is to meet.[26]

Notice in advance of trial as to these jurisdictional allegations was essential to proper preparation. A defendant could prepare to contest the jurisdiction of the court in many ways. He could claim that he was not connected in any way with the acts performed, and that they were not related to the conspiracy charged. Armed with such a defense he would not be required to travel a thousand miles prepared to defend transactions of his entire life and the undisclosed movements of his alleged associates. Your honors must realize also that when the government said in their indictment that the conspiracy was formed in New York, a defendant had a right to prepare himself

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[25] This is an afterthought by the Solicitor General. If the pleader had relied upon Section 420 d the indictment would have contained an allegation that part of the offense had been committed in New York by one of the conspirators. Such an allegation is necessary under the statute as it would be without the statute.

[26] *Guilbeau* v. *United States*, 288 Fed. 731, (C.C.A. 5), *Meyers* v. *United States*, 3 Fed. (2d) 379, 380 (C.C.A. 2), *United States* v. *Byers*, 73 Fed. (2) 419, 422 (C.C.A. 2), *Kutler* v. *United States*, 79 Fed. (2) 440, 442, (C.C.A. 3), *Malaga* v. *United States*, 57 Fed. (2) 822, 825 (C.C.A. 1), *Heitman* v. *United States*, 5 Fed. (2) 887 (C.C.A. 9), *Hoppett* v. *United States*, 11 U.S. 389

to meet that allegation alone. If that could not be proved, he should win in New York and should be permitted to go home. He should not be required to meet some different charge or the theory advanced for the first time in this court.

It is possible that your Honors have overlooked a conflict between the Second and other circuits as to Section 556 Title 18 U.S.C. We quote from our brief (p. 21):

> "The Circuit Court regarded our points as trivial and said that it was curious that we should complain at all, in view of Section 556, Title 18 U.S.C. Of course, your Honors know that constitutional provisions cannot be qualified or amended by statute or decisions. (*Asgill* v. *United States*, 60 Fed. (2d) 780.) In circuits other than the second, it has been held that Congress did not intend to change the law at all, but merely enacted into statute the rule as to harmless error, directing that formal defects be disregarded. (*Little* v. *United States*, 73 Fed. (2d) 861, 866 (C.C.A. 10) where authorities are collected.) (See dissent in 137 F. (2d) 995 (C.C.A. 2).)

The government, in opposition to our petition, relied upon *Berger* v. *United States*, 295 U. S. 78, 83. A study of that case will show that as to Berger, he was convicted of the conspiracy charged. Variances concerning his co-defendants were immaterial. Without mentioning the *Berger case* your Honors departed from it in *McCandless* v. *United States*, 298 U. S. 342. See *Lynch* v. *Oregon Lumber Co.*, 108 Fed. (2d) 283, 286 (C.C.A. 9).[27]

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[27] We quote from the *McCandless case* (347):

> "We think equally it constitutes no ground for sustaining the ruling of the trial court as non-prejudicial. * * *
>
> "In this situation, Sec. 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the

We did not participate in the trial below in the case at bar, but may we suggest but one fatal step which may have been brought about by the variance. The defendants did not take the stand or offer any defense to the merits. Can it be that they were advised that a court of review would be compelled, under the constitution, to reverse the case? If the law is as we understand it to be, such a move would have been wise. It would shorten the record and not furnish evidence to be used in a subsequent prosecution.

When the prosecuting authorities deliberately deprive a defendant of rights guaranteed by the constitution, and the courts below refuse relief, we do not understand that it is necessary to convince this court of the actual damage resulting from the loss of constitutional rights. We trust that upon reconsideration your Honors will perceive that the error was prejudicial, and that it should be corrected.

Reasons for Granting Rehearing.

We have pointed to decisions subsequent to our petition and we trust that we have made our right to consideration more clear. Some one on the brief for the Solicitor General has studied the record carefully in an effort to show that our claim can be avoided on some technical ground. The fact remains that these defendants were transported for trial in violation of constitutional rights known to the school boy.

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substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U.S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U.S. 19, 26."

When German spies landed upon our shores, your Honors were careful to see that they were accorded equal justice under law. Your Honors knew that most of the public would have applauded an immediate execution of the saboteurs. The Chief Justice said in *Ex Parte Quirin*, 317 U. S. 1, 25:

> "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

We do not concede the guilt of your petitioners although we have refrained from a discussion of the evidence. There is not one law for the guilty and another for the innocent. It is laudable that we, as a nation, demonstrate our concept of justice to the dictator nations, but we submit that at the same time it is just as important that our courts demonstrate to our own citizens that the constitution stands firm, and that this is a government of laws not men.

We are not asking your Honors to reverse this conviction at this stage of the proceeding. If it is to be affirmed, we submit that the bar, the public and these defendants are entitled to know the reasons. Upon reconsideration we hope that your Honors will perceive that the mere fact that the Circuit Court of Appeals refused to state our point is a blot upon public justice. An ostrich can not conceal itself by hiding its head in the sand any better than this point can be concealed by terming it trivial. A large portion of the public knows of our point. The natural inference from the failure on the part of the Circuit Court to state our point is that that court

knew that the law affords no answer. If our point is unanswerable, the case should be reversed. If it is trivial, as said by the Circuit Court of Appeals, the constitution is trivial, and if your Honors fail to uphold that instrument, no one will. It is but a scrap of paper.

Your Honors have embarked upon a reform in Criminal Procedure in the new rules. It is our opinion that the new rules will allow a trial court to afford such trial as the court may see fit in the particular case. The great danger is that the constitution will mean nothing. A defendant will have lost in two courts below, on a matter committed by the rules to the discretion of the trial court before application is made here for certiorari. It will be next to impossible for him to enter this court under such conditions. We submit that it is important that this court expound clearly in the case at bar the meaning of the constitutional right to a trial in the district. No previous case has presented the matter so clearly, and the question is bound to arise as long as the government persists in choosing a place of trial calculated to be unfavorable to a defendant. In all of the cases heretofore decided by your Honors, the indictment contained facts from which it could be seen that the government had a legal right to claim venue in the place chosen. In the case at bar, the government resorted to falsity. Is such practice to be condoned when the Circuit Court of Appeals is of the opinion that the result is justified by the means? Are such matters committed to the discretion of the court? Are they trivial? If such practice is to prevail, defendants may be prosecuted in any part of the country chosen by the government by a mere allegation that the conspiracy was formed in the district of trial. A variance need never be feared by the government in any case.

We request that your Honors reconsider our petition for certiorari in the light of the recent holding of this court in *United States* v. *Johnson,* 323 U. S. 273, aforementioned; from which we quote (276):

> "There are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

We respectfully pray for a rehearing, and that certiorari be granted upon such terms as may seem just.

Respectfully submitted,

WM. SCOTT STEWART,
Counsel for Petitioners.

Certificate.

I, Wm. Scott Stewart, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WM. SCOTT STEWART,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

J. BERTRAM WEGMAN,
HAROLD SIMANDL,
Counsel for Petitioner.

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PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now LOUIS KAUFMAN and respectfully petitions this honorable Court for a reconsideration of his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming petitioner's conviction in the United States District Court for the Southern District of New York.

The petition for a writ of certiorari, bearing No. 946 of the October Term, 1944, was denied on April 2, 1945.

Counsel are not unmindful of the fact that this Court is understandably reluctant to burden itself with this extensive record in a case where the crime charged is abhorrent in kind and no sympathy is attached to the petitioners. But counsel persist in an effort to obtain a review and fair consideration for this petitioner whose guilt of the crime was never shown by any evidence, competent or not, and whose conviction can be explained only by recognition

that he was tried in an atmosphere grossly prejudicial to any dispassionate appraisal of the proof.

This prejudice was two-fold: (1) In the proof offered against co-defendants, not even claimed to touch petitioner, but in the atmosphere of which evidence altogether remote from the crime charged was introduced against him, for what the Court below said was the "highly laudable purpose" of prejudicing petitioner, whether or not the evidence was true. (2) In the prosecutor's appeal to the jury to convict petitioner so that petitioner might thereby be constrained to become a witness for the Government against another person, pictured as an associate of the other defendants.

Counsel cannot believe that this Court would refuse review to this petitioner and idly allow him to suffer seven years of imprisonment if not for the fact that counsel's presentation must have been inadequate to demonstrate the injustice here perpetrated by the departures from accepted rules of law and procedure. Therefore this petition that the matter be reconsidered.

I

Although the summary of the evidence against petitioner, set forth in the opinion below is demonstrably wrong in a number of respects—that is to say, the Circuit Court of Appeals changed and added to the evidence in asserting what was thought to have been proven against petitioner, even taking that summary at face value, it is clear that the opinion below, on its face, is in direct conflict with the rulings of other Circuit Courts of Appeals, and directly contrary to applicable decisions of this Court.

Thus, in the face of the recital in the opinion below that the payment was made *after* the negotiations had culminated in an agreement, and that Warner Bros. had been assured that Kaufman would not cause a strike, the Court below said " * * * there was every probability that it [the

money] had been paid to avoid a breakdown in the negotiations, and a consequent strike. If in addition to this, Kaufman told the truth when he said he had paid the whole amount to Bioff, no other conclusion was possible than that he was a party to the general conspiracy."

On the very face of the opinion of the Court below it appears that the only competent evidence held to connect this petitioner with the vast conspiracy charged and claimed to have been proven, was that he had said he had, as a messenger, delivered to Bioff $15,000 which Warner Bros. had given petitioner in 1936. The Court below from this bare circumstance drew the inference that petitioner "could not have been unaware that Bioff was not acting for himself" and concluded that "Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it."

The explicit text of the opinion below shows a direct refusal to follow the ruling of this Court in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, in that it sanctions an inference of knowledge and permits a presumption of participation to be predicated upon the inferred knowledge.

On no more than that it was testified that petitioner had sometime said that he had taken the money to Bioff, the Court below has held there was sufficient proof of connection with the conspiracy.

Lest it be thought that this is over-simplification on petitioner's part, reference is made to the exact language of the opinion below, "The jury was free * * * to convict Kaufman on his own declaration." And to show that the Court below recognized that it was inference only upon which connection with the conspiracy was predicated, see the language of the opinion that petitioner "could not have been unaware that Bioff was not acting for himself" and that these other persons "were his accomplices as he had implied".[1]

[1] The Trial Court, too, stated explicitly that the assumption of knowledge on petitioner's part rested wholly upon inference (R. 2602-2603). And see the prosecutor's argument, R. 2600.

Petitioner was a mere business agent of one of the nearly 800 local unions making up the International Association of Theatrical Stage Employees, etc., and so at the lowest level of importance. Bioff was the personal representative of the International President of this great Union, at the topmost level of importance. The inference is therefore at least as admissible that when petitioner said that he as a messenger had taken the Warner Bros. money to Bioff, he was carrying out orders from the chief of his Union, and not acting as a knowing participant in this vast conspiracy with which he was not otherwise in the least shown to have any connection. In this respect the opinion below is in direct and inescapable conflict with decisions in other Circuit Courts of Appeals, *e.g.*: Third Circuit: *Graceffo* v. *U. S.*, 46 F. (2d) 852, 853; Fifth Circuit: *Kassin* v. *U. S.*, 87 F. (2d) 183; Sixth Circuit: *Tucker* v. *U. S.*, 224 Fed. 833; Eighth Circuit: *Dahly* v. *U. S.*, 50 F. (2d) 37; Ninth Circuit: *Terry* v. *U. S.*, 7 F. (2d) 28.[2]

These other Circuit Courts of Appeals have refused to allow a verdict of guilt to stand if founded on circumstances susceptible of an inference of innocence. The Second Circuit has rejected this view and has held that after verdict the same proof that would sustain a verdict in a civil case is sufficient in a criminal case.

What the Second Circuit rule comes down to is, that the verdict of a jury is final and conclusive if an inference of guilt may possibly be drawn from circumstances, regardless that contrary inferences are equally or more logically deducible. Thereby in the Second Circuit the presumption of innocence and the requirement of proof beyond a reasonable doubt have become empty shibboleths, unheeded by the Appellate Court any more than by a Trial Judge if

[2] In *U. S.* v. *Valenti*, 134 F. (2d) 362, 364, the Court below explicitly rejected the doctrine of these cases and numberless others, saying that it confused the function of judge and jury, as well as the nature of the proof required in criminal cases. *U. S.* v. *Mule*, 141 F. (2d) 487, 488, reiterated this position. In slightly different form it was restated in *U. S.* v. *Feinberg*, 140 F. (2d) 592, at p. 594, and in *U. S.* v. *Cohen*, 145 F. (2d) 82, at p. 86, where the Court again recognized the conflict between its views and those of other courts. The two lines of development meet in the petitioner's case.

ignored by a jury swayed by prejudice or some motive other than the proof. Unless this Court is in accord with this concept, and has completely discarded the rule of *Coffin* v. *U. S.*, 156 U. S. 432, then this case merits review. In any event, the conflict among the Circuit Courts of Appeals ought to be resolved.

The Trial Court had said on a number of occasions during the trial, after all of the testimony concerning the delivery of this money to Kaufman, and his alleged declarations that he had taken the money to Bioff, that the prosecution had not connected Kaufman with the conspiracy. It was thus obvious to the Trial Court that inferences other than those leading to guilt could be drawn from all of this testimony.

The prosecution certainly realized that it had failed to connect Kaufman to the conspiracy by all of the testimony that the Court below now says pointed to guilt.

The prosecution therefore offered the testimony of the perjurer, Roach, in an attempt to bridge the essential gap in its proof.

That Roach's testimony was completely perjurious was not demonstrated until well into the defendants' case. The fact that the perjury was not until then demonstrated was the only explanation for the failure of the Trial Court to dismiss the indictment against petitioner at the close of the Government's case. Indeed, it was not until all of the summations of defense counsel had been completed and only during the summation of the prosecutor, that the Trial Court announced its determination to direct the jury to disregard the testimony of the perjurer, Roach.

So, the inferences are now sought to be drawn to replace the perjured testimony. But the inferences are just as dubious.

II

Directly contrary to the decision of this Court in *Glasser* v. *U. S.*, 315 U. S. 60, the Court below has explicitly held "The only other testimony connecting Kaufman is that in the spring of 1934 when several of the group were discussing how to elect Browne as president of the Union, one, Buchalter, had said that he would see to it that a person named Zwillman 'delivers Kaufman' ". The Court below said that when it appeared "that Kaufman later became connected with the conspiracy, all evidence became competent against him, of whatever had been theretofore done in its execution". This holding is in direct and unmistakable conflict with the ruling of the Circuit Court of Appeals for the Sixth Circuit in *Nibbelink* v. *U. S.*, 66 F. (2d) 178, and likewise in direct and irreconcilable conflict with the ruling of the Circuit Court of Appeals for the Tenth Circuit in *Minner* v. *U. S.*, 57 F. (2d) 506. The cited decisions hold squarely that testimony of declarations of alleged co-conspirators can be admitted only upon independent proof that the person against whom such testimony is to be used was a member of the conspiracy *at the time* the declarations were made.

From the very nature of the testimony, as shown in the opinion below, it is abundantly clear that petitioner could not possibly have been a member of the conspiracy at the time of the alleged discussion; the very discussion obviously did not even look forward to participation in the conspiracy by petitioner; and most important of all, the crime itself was legally uncommittable at the time of the alleged declaration because the discussion was had long prior to the time when the statute denouncing the crime was enacted into law.

Yet the Court below has approved the use of that testimony and has allowed it to color its judgment that petitioner was connected with the conspiracy;[3] having done

[3] The Circuit Court of Appeals said this was "other testimony connecting Kaufman".

that, it of course ignored the fact that the Trial Court allowed the jury to consider the testimony to determine if petitioner was connected.

III

By denying certiorari, this Court has failed to correct:

(1) The clear discrepancy between the Second Circuit and other circuits in respect of allowing an inference of guilt to be drawn from circumstances susceptible of an inference of innocence;

(2) The use of perjured testimony;

(3) The use of evidence of alleged spoliation without regard for either the truth or connection with the case on trial;

(4) The use of hearsay for the purpose of connecting a defendant, the more abhorrent legally because the hearsay related to a time prior to any possible participation of the defendant and even before the statute denouncing the crime was enacted.

IV

Counsel for other defendants in this case who have petitioned for rehearing can demonstrate that their petition is not for delay, because such other petitioners have long since been serving the sentences imposed. This petitioner cannot make a like demonstration because he alone was allowed to remain on bail pending the appeal, and the Court below stayed its mandate pending the petition for a writ of certiorari. Nevertheless, the foregoing recital is respectfully submitted as a demonstration of the fact that this petitioner, whose position in this case is unique, can point to direct conflicts between the opinion below and the rulings in other circuits concerning the admissibility of

evidence and the sufficiency of proof, which must have been overlooked by this Court else the petition could not have been denied.

Wherefore, your petitioner, by counsel whose signatures are subscribed, prays that his petition for a writ of certiorari may be reconsidered.

Counsel certify that this petition for a rehearing is submitted in good faith and the sincere belief that it has merit, and not for the purpose of delay.

Respectfully submitted,

LOUIS KAUFMAN,
Petitioner,

by J. BERTRAM WEGMAN and
HAROLD SIMANDL,
Counsel for Petitioner.